144-568

RECORD, CASE No. 13,388.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

TERM No., 269.

E. P. KELLAM AND C. K. HOLLIDAY, APPELLANTS,

vs.

MORRELL C. KEITH.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

FILED OCTOBER 19, 1888.

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1 In the District Court in and for the County and State of Kansas.

MORRELL C. KEITH, Plaintiff,
vs.
EDWARD P. KELLAM and CYRUS K. HOLLIDAY, Defendants. } No. 8133. Civil Action.

Be it remembered that heretofore, to wit, on the 9th day of February, 1887, the plaintiff in the above-entitled action filed in the office of the clerk of the district court in and for the county of Shawnee and State of Kansas his petition in said action, which was in words and figures as follows:

In the District Court of Shawnee County, State of Kansas.

MORRELL C. KEITH, Plaintiff,
vs.
EDWARD P. KELLAM and CYRUS K. HOLIDAY, Defendants. } Petition.

The said plaintiff for his cause of action against said defendants states that on the 19th day of August, A. D. 1886, said plaintiff was the owner in fee simple of the following-described lands and tenements, situate in the county of Shawnee and State of Kansas, to wit:

The east half of the southeast quarter of section 25, in township 11 south of range 15 east of the sixth principal meridian, and also of a part of the east half of the northeast quarter of the same section, described as follows, to wit: Commencing at the southeast corner of the said northeast quarter, running thence north 13 rods; thence at a right angle west one quarter of a mile; thence at
2 a right angle south 13 rods; thence at a right angle east to the point of beginning.

And said plaintiff had so been the owner of said land for more than five years previous to said last-mentioned day; that said defendant Edward P. Kellam was and had been during all the time the general agent of said plaintiff for reasonable compensation to care for said land, pay the taxes thereon, and to sell the same; that said plaintiff resided in the State of Nebraska and at a great distance from said land and did not know the value thereof; that said Edward P. Kellam resided in the city of Topeka, in said Shawnee county, near to said land, and well knew the value thereof; that said land, on said August 19, 1886, was worth and was of the full value of $100,000.00, and could then have been sold for said sum, as both of said defendants then well knew; and said defendants, knowing the ignorance of said plaintiff concerning the value of said land, conspired together to fraudulently purchase the said land from said plaintiff for themselves at a price greatly less than its real value, and pursuant to said conspiracy it was agreed between said

defendants that said defendant Edward P. Kellam, then being agent for said plaintiff, should represent to said plaintiff that said defendant Cyrus K. Holliday offered to purchase the said land for himself and to pay therefor the sum of $60,000.00, and that the said Edward P. Kellam should represent to said plaintiff that said land was worth no more than said sum of $60,000.00, and if the same could be obtained that they, the said defendants, would jointly pay for said land, and by a conveyance to be made by said Cyrus K. Holliday to said Edward P. Kellam each of said defendants would become the owner of an undivided one-half thereof; and pursuant to said agreement said Edward P. Kellam, so being agent of said plaintiff, wrote to said plaintiff and informed him that said Cyrus K. Holliday offered to pay said sum of $60,000 for said land, and that the same was worth *worth*
3 no more than $60,000; and the said plaintiff, relying upon the said representations of his said agent, Edward P. Kellam, and being deceived thereby and being ignorant of the real value of said land, which was then said value of $100,000, and being ignorant of the fact that said Edward P. Kellam was to have or obtain any interest in said land or in said purchase, accepted said offer, and on said 19th day of August, 1886, made his deed conveying said land to said Cyrus K. Holliday, and transmitted the same to — Topeka to be delivered to said Cyrus K. Holliday upon the payment and securing the consideration therefor; and thereupon the said Edward P. Kellam and Cyrus K. Holliday jointly and in equal shares paid the portion of cash which was to be paid upon the delivery of said deed; and at the time of the delivery of said deed to said Cyrus K. Holliday and as party of the same transaction and pursuant to the said previous agreement between the said Cyrus K. Holliday and the said Edward P. Kellam the said Cyrus K. Holliday made and delivered a deed to said Edward P. Kellam conveying to him the undivided one-half of said land, which last-named deed to Edward P. Kellam was made on the first day of September, 1886, and both of said deeds were filed for record in the office of the register of deeds of said Shawnee county at the same time, on the 20th day of September, 1886, and said deed of said plaintiff to said Cyrus K. Holliday was recorded in said office, in volume 125, page 335, and said deed to Edward P. Kellam was recorded in the same volume, on page 336.

And said plaintiff says that upon ascertaining said facts he offered to restore and return to said defendants all things which he had received from them for said land, and requested them to reconvey said land to said plaintiff, which offer and request the said defendants refused to comply with, and are threatening that they will sell and dispose of said land as their own and con-
4 vert all the proceeds thereof to their own use, and said plaintiff now brings into court and offers to return to said defendants the whole consideration for said land.

Wherefore said plaintiff prays judgment against said defendants that said deed of said plaintiff to said Cyrus K. Holliday be cancelled; that said defendants be adjudged to hold the title to said

land in trust for said plaintiff; that they may be decreed to reconvey the said land to said plaintiff, and in default of such conveyance that the decree of this court be effectual to vest all their right, title, and interest in said land in said plaintiff, and that said defendants be forever enjoined and restrained from making any conveyance or incumbrance of said land to any other person than said plaintiff, and for such other relief as may be equitable.

QUINTON & QUINTON AND
A. BERGEN, *Atty's for Pl'ff.*

Which said petition was endorsed as follows:

No. 8133. Morrell C. Keith *vs.* Edward P. Kellam *et al.* Petition. Filed Feb. 9, 1887. W. E. Sterne, clerk dist. court.

And thereupon there issued from the office of the clerk of said court a summons in words and figures as follows:

UNITED STATES OF AMERICA,
State of Kansas, Shawnee County, } *ss:*

The State of Kansas to the sheriff of Shawnee county, Greeting:

You are hereby commanded to notify Edward P. Kellam and Cyrus K. Holliday that they have been sued by Morrell C. Keith in the district court within and for the county of Shawnee, in the third judicial district of the State of Kansas, and that unless they answer by the 11th day of March, A. D. 1887, the petition of the said Morrell C. Keith against them, filed in the clerk's office of the court aforesaid, such petition will be taken as true and judgment rendered accordingly.

You will make due return of this summons on or before the 19 day of February, A. D. 1887.

Witness my hand and the seal of said court affixed, at [SEAL.] my office, in the city of Topeka, this 9 day of February, A. D. 1887.

W. E. STERNE, *Clerk,*
By I. S. CURTIS, *Dept.*

Summons endorsed as follows: No. 8133. Summons. M. C. Keith *vs.* E. P. Kellam *et al.* Issued Feb. 9, 1887; returnable Feb. 19, 1887. Quinton & Quinton & A. Bergen, att'ys for pl'ff.

And which said summons was afterwards, to wit, on the 10th day of February, 1887, returned into the office of said clerk by the sheriff of said county of Shawnee with the following endorsement thereon, showing the doings of said sheriff:

Received this summons this 9th day of Feb., 1887, and executed the same this 9 day of Feb., 1887, by delivering a true and certified copy of this summons to E. P. Kellam personally and leaving a true and certified copy of this writ at the usual place of residence of Cyrus K. Holiday.

A. M. FULLER, *Sheriff,*
By A. KEYHENDALL,
Dept. Sheriff.

Service	75
Copies	50
Milage	20
Total	1 40

And afterwards, to wit, on the 2nd day of March, 1887, the defendant- filed in the office of the clerk of said court their petition for a removal of said action to the circuit court of the United States for the district of Kansas; which said petition was in words and figures as follows:

6 In the District Court in — for the County of Shawnee and State of Kansas.

MORRELL C. KEITH, Plaintiff,
vs.
EDWARD P. KELLAM and CYRUS K. HOLIDAY, Defendants.
} No. 8133. Petition for Removal to U. S. Circuit Court.

And now comes the said defendants Edward P. Kellam and Cyrus K. Holiday, by Rossington, Smith & Dallas and John T. Morton, their attorneys, and represent and aver that in this action the matter in dispute exceeds, exclusive of costs and interest, the sum and value of five hundred dollars, and in fact exceeds, exclusive of interest and costs, the sum of two thousand dollars, and that in this suit there is a controversy which is wholly between *between* citizens of different States, the said plaintiff being a citizen of the State of Nebraska and both of said defendants being citizens of the State of Kansas, and that the controversy can be fully determined as between them, the said plaintiff and said defendants.

These defendants therefore ask that this cause be removed into the circuit court of the United States in and for the district of Kansas to be held in said district; that this court accept this petition and the bond herewith filed and proceed no further in this action, and that this cause be removed into said circuit court.

ROSSINGTON, SMITH AND DALLAS,
Atty's for said Def'ts.

And said petition was endorsed as follows: No. 8133. Morrell C. Keith *vs.* Edward P. Kellam and Cyrus K. Holiday. Petition for removal. Filed March 2, 1887. W. E. Sterne, clerk dist. court.

And on said second day of March, 1887, said defendants, with their said petition for removal, filed their bond for removal
7 to said circuit court; which said bonds was in words and figures as follows:

In District Court in and for the County of Shawnee and State of Kansas.

MORRELL C. KEITH, Plaintiff,
vs.
EDWARD P. KELLAM and CYRUS K. HOLIDAY, Defendants.
} No. 8133. Bond for Removal.

Know all men by these presents that we, Edward P. Kellam and Cyrus K. Holliday, as principal, and John T. Morton, Thomas J. Kellam, as sureties, are hereby firmly held and bound unto Morrell C. Keith in the sum of five hundred dollars; for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, firmly by these presents. Witness our hands and seals this 2nd day of March, A. D. 1887.

The condition of the above obligation is such that whereas the said Edward P. Kellam and Cyrus K. Holiday, defendants in the above-entitled suit, have filed in the said district court in and for the county of Shawnee and State of Kansas their petition for the removal of said suit into the circuit court of the United States in and for the district of Kansas: Now, if the said Edward P. Kellam and Cyrus K. Holliday shall on the first day of the next session of said circuit court enter in said circuit court a copy of the record in said above-entitled suit and shall pay all costs that may be awarded by the said circuit court if said circuit court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation shall be null and void; otherwise to be in full force and effect.

E. P. KELLAM. [SEAL.]
JOHN T. MORTON. [SEAL.]
T. J. KELLAM. [SEAL.]

8 Which said bond is endorsed as follows: No. 8133. Morrell C. Keith *vs.* Edward P. Kellam *et al.* Bond for removal. Filed Mar. 2, 1887. W. E. Sterne, clerk dist. court.

And thereupon the following proceedings were had and duly entered upon the journal of said district court.

MORRELL C. KEITH, Plaintiff,
vs.
EDWARD P. KELLAM and CYRUS K. HOLLIDAY, Defendants.
} 8133.

And now comes the said defendants Edward P. Kellam and Cyrus K. Holliday, by Rossington, Smith and Dallas and J. T. Morton, their attorneys, and file their petition for a removal of this action to the circuit court of the United States for the district of Kansas, and their bond with good and sufficient security for entering in said circuit court on the first day of the next session a copy of the record in the suit and for paying all costs that may be awarded by said circuit court if said court shall hold that said suit was wrongfully or improperly removed thereto.

It is therefore ordered that said petition and bond be, and the same are hereby, accepted; that this court proceed no further in this action, and that said action be, and the same is hereby, removed to said circuit court.

Certificate.

STATE OF KANSAS, *Shawnee County,* } *ss:*

I, W. E. Sterne, clerk of the district court within and for the county and State aforesaid, do hereby certify that the above
9 and foregoing is a full, true, and correct *and* transcript and copy of the record in the action heretofore pending in said court, wherein Morrell C. Keith is plaintiff and Edward P. Kellam and Cyrus K. Holiday are defendants, as the same appears of record and on file in my office.

Witness my hand and the seal of said court hereunto affixed, at my office, in the city of Topeka, this 7th day of March, A. D. 1887.

[SEAL.] W. E. STERNE, *Clerk,*
By W. E. BRUBAKER, *Deputy.*

Total costs in district court $—.

Endorsed: No. 5934. Morrell C. Keith *vs.* Edward P. Kellam *et al.* Transcript. Copy of record. Filed March 7, 1887. A. S. Thomas, clerk, by Frank H. Holt, deputy.

10 In the Circuit Court of the United States for the District of Kansas.

MORRELL C. KEITH, Complainant,
vs.
EDWARD P. KELLAM and CYRUS K. HOLLIDAY, Defendants. } In Equity.

And now come said defendants, by John T. Morton and Rossington, Smith & Dallas, their solicitors, and move the court here that

Whereas the said defendants are informed and believe that the said Morrell C. Keith or his solicitors, A. Bergen or Quinton & Quinton, have in their possession or under their control certain letters, writings, and other documents containing evidence relating to the merits of the above-entitled suit and the defense therein; and

Whereas the solicitors of said complainant have admitted the possession of such letters and documents and have refused permission to the said defendants to inspect and take copies of the same:

And whereas the said defendants did on the 24th day of February, A. D. 1887, make a written demand upon the said complainant for the production of said documents, which said defendants alleged are wholly within the custody and control of the said complainant and of which the defendants have no copies, and the said demand especially covered and related to all letters written by E. P. Kellam

to Morrell C. Keith in reference to the management or control in any respect of the real estate mentioned and described in the plaintiff's petition or the purchase thereof by C. K. Holliday or any other purchaser, and especially all such letters written by the said E. P. Kellam to the said plaintiff during the years 1884, 1885, and 1886; that the said Morrell C. Keith, plaintiff, and his solicitors, A. Bergen and Quinton & Quinton, be ordered, directed, and required to produce in the clerk's office of the circuit court of the United States the originals of all letters, papers, and other documents
11 under the control of the said Morrell C. Keith or his said solicitors or either of them containing evidence relating to the merits of the above-entitled action and to the defense therein on or before the rule day of April, 1887, to wit, the first Monday in April, 1887, and likewise to produce as aforesaid all letters written by E. P. Kellam to Morrell C. Keith in reference to the management or control in any respect of the real estate mentioned and described in the plaintiff's petition or the purchase and sale thereof by C. K. Holliday or any other purchaser and all such letters written by the said E. P. Kellam to the said Morrell C. Keith during the years 1884, 1885, and 1886 as hereinbefore demanded. Said defendants allege that all of the said papers are necessary to enable them to answer the said complainant's bill of complaint, or that said plaintiff show good cause in writing on said rule day why said papers should not be produced, and that in default of the production of said papers and all of them by the said Morrell C. Keith or his solicitors or either of them or upon failure to show good cause in writing why the same should not be produced, that the complainant's said bill of complaint be dismissed.

JOHN T. MORTON,
ROSSINGTON, SMITH & DALLAS,
Defendants' Solicitors.

Endorsed: No. 5934. U. S. circuit court. Morrell C. Keith *vs.* Kellam & Holliday. Motion. Filed March 7, 1887. A. S. Thomas, clerk, by Frank H. Holt, deputy. Rossington, Smith & Dallas, def'ts' solicitors, Topeka, Kansas.

12 UNITED STATES OF AMERICA, *District of Kansas*, } *ss:*

At a term of the circuit court of the United States of America for the district of Kansas begun and held at the city of Topeka, in said district, on Monday, the 22nd day of November, A. D. 1886, proceedings were had and appear of record in words and figures following, to wit:

MONDAY, *March* 14, 1887.

MORRELL C. KEITH, Complainant,
vs.
EDWARD P. KELLAM and CYRUS K. HOLLIDAY, Defendants. } 5934.

It is ordered by the court that defendants be, and are hereby, given until April rule day, 1887, to plead answer or demur herein.

MONDAY, *April* 4, 1887.

MORRELL C. KEITH, Complainant,
vs.
EDWARD P. KELLAM, Defendant. } 5934.

And now, on this 4th day of April, A. D. 1887, this cause came on to be heard on the motion of defendants filed herein on the 7th day of March, 1887, and upon consideration thereof and upon argument of counsel it is by me ordered and adjudged that said complainant or his solicitors produce for the inspection of the solicitors of said defendant all letters and telegrams in their or either of their possession relating to the merits of the above-entitled suit and the defense therein, and all letters written by E. P. Kellam to Morrell C. Keith in reference to the management or control in any respect of the real estate mentioned and described in said plaintiff's petition or the purchase thereof by C. K. Holliday or any other purchaser, and especially all such letters and telegrams written by the said E. P. Kellam to the said plaintiff during the years 1884,
13 1885, and 1886, and that said defendant's solicitors may be permitted to take copies of the same when produced, and that the same shall be produced for inspection and copy, as aforesaid, within 15 days from this 4th day of April, 1887, at Topeka, Kansas, and that a copy of this order shall within two days be served upon the solicitors of said complainant.

C. G. FOSTER, *Judge.*

14 MONDAY, *April* 11, 1887.

MORRELL C. KEITH
vs.
EDWARD P. KELLAM and CYRUS K. HOLLIDAY. } 5934.

It is ordered by the court that the complainant herein have until the rule day of May, 1887, to recast his bill and to comply with the order of court of April 4, 1887, in this suit.

15 To the judges of the circuit court of the United States for the district of Kansas:

Morrell C. Keith, of North Platte, Nebraska, and a citizen of the State of Nebraska, brings this his bill against Edward P. Kellam, of Topeka, and a citizen of the State of Kansas, and Cyrus K. Holliday, of Topeka, and a citizen of the State of Kansas; and thereupon your orator complains and says that on the 19th day of August, A. D. 1886, your orator was and for more than twenty-eight years had been the owner in fee simple of the following-described lands and tenements situate in the county of Shawnee and State of Kansas, to wit: The east half of the southeast quarter of section twenty-five (25), in township eleven (11) south of range fifteen (15) east of the sixth principal meridian, and also a part of the east half of the northeast quarter of the same section, described as follows, to wit: Commencing at the southeast corner of the said north-

east quarter and running thence north thirteen (13) rods; thence at a right angle west one-quarter of a mile; thence at a right angle south thirteen (13) rods; thence at a right angle east to the point of beginning.

That said Edward P. Kellam, who resided near the said land and in the city of Topeka, in said county of Shawnee, State of Kansas, was on said August 19th, 1886, and had been for more than fifteen years the general agent of said complainant as to said land and during said time had acted as the complainant's agent in the care of said land, in preventing waste upon it, in fencing and improving said land, in apprising complainant of the taxes levied thereon from year to year, and in paying such taxes out of money furnished by the complainant, and in leasing and collecting the rents for said land, and in protecting the interests of complainant in said
16 land as to the location of railroads and highways on said land and collecting the damages thereto for said complainant, and in keeping said plaintiff informed from time to time of the value of said land; and throughout the negotiations and transactions relative to the sale thereof hereinafter mentioned said Edward P. Kellam was and acted as the agent of the said complainant.

That during all the time last aforesaid the said complainant resided in the State of Nebraska and elsewhere, at a great distance from said land, and had not seen nor been near to the said land in more than eighteen years at and immediately preceding said August 19th, 1886, and did not know the value thereof nor anything affecting the said land or the value thereof except as informed by his said agent, the defendant Edward P. Kellam, upon whose fidelity said complainant confidently relied and depended.

And complainant further represents unto your honors that long after he had seen the said land or the vicinity in which it was situate and within the year immediately preceding the time of the sale hereinafter mentioned, to wit, the 19th day of August, 1886, the city of Topeka and its additions had extended about and beyond the said land and many elegant dwelling-houses had been erected about and beyond the said land and many improvements had been made and other improvements determined upon by the extension and construction of street-car lines and the extension of gas and water mains in said vicinity, greatly enhancing the market value of said land, and said Edward P. Kellam had been offered for said land sums much greater than the sum of sixty thousand dollars; that said land was, on said August 19th, 1886, and at the time of the sale thereof, hereinafter mentioned, worth and was of the full market value of one hundred thousand dollars and could then have been sold for said sum, as both of said defendants then well
17 knew; and said defendants at all times well knew the value of said land and all the facts hereinbefore stated, including the fact that this complainant was ignorant of the value of said land and of the full facts affecting its value.

And thereupon, under the circumstances aforesaid, on or about the 15th day of July, 1886, and before any bargain, agreement, or contract of sale had been entered into by or between the said com-

plainant and the said Cyrus K. Holliday, the said defendants entered into a conspiracy to fraudulently obtain the title to said land for themselves from said complainant at a price greatly less than its real value; and the said Edward P. Kellam having previously informed said complainant that said land was not worth more than sixty thousand dollars, as said Cyrus K. Holliday well knew, it was agreed between said defendants that said Edward P. Kellam, being then the agent of said complainant as aforesaid, as said Cyrus K. Holliday well knew, should endeavor to obtain from said complainant a conveyance of said land to said Cyrus K. Holliday for the sum of sixty thousand dollars and should not inform said complainant that said land was worth more than said sixty thousand dollars, and that if such conveyance of said land could be obtained the said Edward P. Kellam should become the owner of the undivided one-half of said land by a conveyance thereof afterwards to be made by said C. K. Holliday for a consideration which had been agreed upon by said defendants, the exact amount of which is unknown to complainant but which complainant avers did not exceed the one-half of said sum of sixty thousand dollars.

And your orator further represents that in pursuance of said fraudulent conspiracy the said Edward P. Kellam, so being agent as aforesaid of said complainant, entered into correspondence with your orator relative to the sale of said land and did never at
18 any time communicate to him the fact that said land was worth more than sixty thousand dollars nor the full facts aforesaid whereby its value had recently been greatly enhanced.

And your orator further represents unto your honors that under the circumstances aforesaid your orator, relying upon the fidelity of his said agent, Edward P. Kellam, to — his duty of informing your orator of the value of said land and of all things affecting such value, and relying upon the aforesaid representations of his agent, and being ignorant of the fact that said land was worth more than sixty thousand dollars, and believing that the same was worth no more than the said sum of sixty thousand dollars, and being ignorant of the full facts aforesaid enhancing its value, and being ignorant that his said agent, Edward P. Kellam, was to have any interest in said land or in said purchase, said complainant did, on said 19th day of August, 1886, make and acknowledge a deed conveying said land to the said Cyrus K. Holliday, and transmitted the same from complainant's said residence at North Platte, Nebraska, to his said agent, Edward P. Kellam, at Topeka, Kansas, to be delivered by him to said Cyrus K. Holliday, whereby the price of sixty thousand dollars should be paid or satisfactorily secured to his agent, Edward P. Kellam.

And said complainant further represents to your honors that on the 30th day of August, 1886, the said Cyrus K. Holliday paid to said Edward P. Kellam, as part payment for the said land, the sum of twenty-five thousand dollars; and said Edward P. Kellam, as agent of said complainant, transmitted the same to said complainant, and that, on the first day of September, 1886, pursuant to the said agreement between the said Cyrus K. Holliday and said Ed-

ward P. Kellam, which had been made and entered into before
19 said complainant had been induced as aforesaid by said Edward P. Kellam to sell said land or to agree to sell the same, the said Cyrus K. Holliday, in consideration of one dollar and that said Edward P. Kellam assumed to pay one-half of the thirty-five thousand dollars still due and owing for said land, made, acknowledged, and delivered to the said Edward P. Kellam a deed whereby said Cyrus K. Holliday conveyed to said Edward P. Kellam the undivided one-half of said lands and tenements, which deed was recorded in the office of the register of deeds in and for Shawnee county, Kansas, at 11.30 a. m. on September 20th, 1886, in Book 125, at page 336.

And your orator further represents unto your honors that the said Edward P. Kellam, at the same time with the delivery of the said last-mentioned deed of Cyrus K. Holliday to Edward P. Kellam, delivered said deed of Morrell C. Keith to said Cyrus K. Holliday, and said last-mentioned deed was filed for record in the office of the register of deeds of said Shawnee county, Kansas, on the said 20th day of September, 1886, at 10.20 o'clock a. m. of said day, and was recorded in Book 125, at page 335, in the records of said register's office.

That to secure the balance of the said sixty thousand dollars to be paid for said land the said Cyrus K. Holliday made two certain promissory notes, dated August 19th, 1886, each for the sum of seventeen thousand five hundred dollars, with six per cent. per annum interest thereon, the one due on or before one year after date and the other due on or before two years after date and payable to the order of said complainant, and made two mortgages of said land, each securing one of said notes, which mortgages each bore date August 19th, 1886, and each was certified to have been acknowledged by said Cyrus K. Holliday. At the same time with the delivery of the deeds hereinbefore mentioned — delivered said notes and mortgages to said Edward P. Kellam, said complainant's agent,
20 for complainant, and said mortgages were filed for record in the office of the register of deeds of said county of Shawnee on the 20th day of September, 1886, at 10.21 o'clock a. m. of said day, and were recorded in Book 114 of said office, the one on page 608 and the other on page 609, and on said September 20th, 1886, said notes and mortgages were transmitted by said Edward P. Kellam to said complainant.

And said complainant says that immediately upon his ascertaining the said facts, to wit, on February 8th, 1887, he offered to said Edward P. Kellam, who was also then agent for said Cyrus K. Holliday, to return and restore to said defendants all things which he had received from them for said land, and expressed his desire that said defendants should reconvey said land to said complainant, which offer said Edward P. Kellam refused and said that complainant would have to see said Cyrus K. Holliday, and said complainant avers that said Cyrus K. Holliday was then absent from the city of Topeka and the State of Kansas, and neither said complainant or any of his agents or attorneys knew where said Cyrus

K. Holliday then was, and said defendants were threatening to sell and dispose of said land as their own and convert the proceeds thereof to their own use.

And complainant further says that any further offer or any tender to said defendants or either of them would have been unavailing, because that said defendants were unwilling at all times to accept the return of what they had given for said land and interest upon the money and reconvey the said land to said complainant, and would have refused any such tender.

And said complainant now brings here into court and offers to return to said defendants the whole consideration for said land, to wit, twenty-five thousand dollars, with seven per cent. per annum interest thereon from the 30th day of August, 1886, and the
21 aforesaid notes and mortgages to be delivered to said defendants or either of them as the same may be accepted by them or as the court may order or direct.

All which actings, doings, and pretences of said defendants are contrary to equity and good conscience and tend to the manifest wrong, injury, and oppression of your orator in the premises. In consideration whereof and forasmuch as your orator is entirely remediless in the premises according to the strict rules of the common law and can only have relief in a court of equity, where matters of this nature are properly cognizable and relievable, to the end, therefore, that the said Cyrus K. Holliday and Edward P. Kellam may full, true, direct, and perfect answer make (not on oath, answer under oath being hereby expressly waived by said complainant) to all the matters hereinbefore stated and charged as fully and particularly as if the same were hereinafter repeated and they thereunto distinctly interrogated;

And the complainant prays the decree of this court that the contract hereinbefore set forth and the said deeds and mortgages may be rescinded and annulled, and that said defendants receive the said money and interest, and that they by good and sufficient deed or deeds reconvey said land to said complainant, or in default of such conveyance that the said deed of this complainant to said Cyrus K. Holliday be cancelled, and by the decree of this court that all the title which was vested in said Cyrus K. Holliday by said deed be reinvested in this complainant, and that said defendants hold said title only in trust for said complainant, and that said defendants and each of them be enjoined and restrained from conveying said land or any part thereof or any interest therein to any other person, and that your orator may have such further and other relief in the premises as the nature of his case shall require and to your honors shall seem meet—

22 May it please your honors to grant unto your orator the most gracious writ of subpœna of the United States of America, to be directed to the said Edward P. Kellam and the said Cyrus K. Holliday, thereby commanding them and every of them, at a certain day and under a certain pain therein to be specified, personally to be and appear before your honors in this honorable court and then and there to answer all and singular the premises, and to

stand to, perform, and abide such order and decree therein as shall seem agreeable to equity and good conscience; and your orator shall ever pray.

QUINTON & QUINTON,
Solicitors for Complainant.

A. BERGEN, *Of Counsel.*

Endorsed: No. 5934. Morrell C. Keith *vs.* Edward P. Kellam *et al.* Bill of complaint. Filed May 2, 1887. A. S. Thomas, clerk, by Frank J. Thomas, deputy.

23 Ex. A.

UNITED STATES LAND OFFICE,
NORTH PLATTE, NEB., *May* 3*d*, 1886.

DEAR KELLAM, I don't want a road there, but if it must be, put in claim for damages. Get all you can.

What can the land be sold for now?

Yours truly M. C. KEITH
" N "

24 Ex. B.

RAILROAD HOUSE, NORTH PLATTE, NEBRASKA,
NORTH PLATTE, *Feb.* 27, 1880.

DEAR ED Encloesd you will find a letter from som man over ther the best thing to do is tell him that I don't want to sell it has cost me more than he offers Get the lowist price on that peas north of mine

Yours truely M. C. KEITH

25 Ex. C.

Thos. L. Ross, notary public. Lewis B. McClintock.

Office of Ross & McClintock, the largest real estate, loan, and collecting agency in Kansas; pay taxes, place loans, take charge of property, and collect rents; agents for the great Pottawatomie reserve and other railroad lands.

TOPEKA, KANSAS, *February* 23, 1880.

Mr. M. C. Keith, North Platte, Nebraska.

DEAR SIR We learn through Mr. Kellum you are the owner of 86 acres of land west of Mrs. Wards'.—In showing a party around the city their attention was attracted to your tract. Have seen Mr. Kellum & think he is inclined to the opinion it would be a pretty good time to sell. We of course could only proximate a price therefore declined to give our opinion but judged from what they said they would be willing to give about $10,000.00 for the entire tract. That is pretty close to the value. If you will give us a price either direct or through Mr. Kellum I think we could sell. Our commissions on sales are 5%. We have charge of Potwins just west of yours—he is anxious to sell at much less than he paid 10 years ago

Truly yours ROSS & McCLINTOCK

26 Ex. D. W. N. Cartwright, Notary Public.

UNITED STATES LAND OFFICE, *July* 7, 188–.

FRIEND KELLAM I will take that mans offer if he takes it with in a few days I would rather you would have it

Yours truley M C KEITH.

27 Ex. E. W. N. Cartwright, Notary Public.

NORTH PLATTE, *July* 20.

FRIEND ED I don't think I want to sell on time but tell him to make me a propisision and I will tell him what I will do

1886.

28 Ex. F. W. N. Cartwright, Notary Public.

JULY 29.

DEAR ED I will take twenty five thousan down the ballance to suit you

Yours truley M C KEITH

1886.

29 G. W. N. Cartwright, Notary Public.

NORTH PLATTE, —— 18.

DEAR ED I was a way when youre letter come but will cend deade to day you have morgage fixt and put on record

Yours truley M. C. KEITH

Aug. 18, '86.

30 H.

Form No. 1.

The Western Union Telegraph Company.

This company transmits and delivers messages only on conditions limiting its liability, which have been assented to by the sender of the following message.

Errors can be guarded against only by repeating a message back to the sending station for comparison, and the company will not hold itself liable for errors or delays in transmission or delivery of unrepeated messages beyond the amount of tolls paid thereon, nor in any case where the claim is not presented in writing within sixty days after sending the message.

This is an unrepeated message, and is delivered by request of the sender under the conditions named above.

NOVIN GREEN, *President.*

THOS. T. ECKERT,
General Manager.

Number 86 Ks.	Sent by C.	Rec'd by Br.	10 pd.	Check 251 P.

Received at Topeka, Kansas, Sept. 18 1886.
Dated, North Platte Neb. 18.

To E. P. Kellam

Is mortgage executed for record. Why don't you send.

M C KEITH

31 I.

First offer.

Will pay cash down $10,000 remaining $50,000 to be paid in half yearly payments, each $10,000 with inst. at rate of 6%. per annum, or will pay cash down $20,000 remaining $40,000, as follows: In one year $20,000 in two years 20,000 with inst. at rate of 6% per annum.

Back payments to be secured by mortgage on the land.

Wants priviledge to pay more, or all, of the purchase money, at any time, and have corresponding portions of the land released.

31½ Shall require abstract of title &c If you accept either of the above offers I will see to making out all necessary paper &c

Let me hear from you soon

Yours truly

E P KELLAM

Sent July 27, '86.
Ex. I.
With M.C.K.'s letter of July 29, '86.

32 Ex. J.

JUNE 26, '6.

M. C. Keith, Esq., North Platte, Neb.

DEAR SIR: We are handling a great deal of city property, as you may be well aware. We are agents for Mr. Potwin's sub-division, lying just west of your 86 acres, and we have had some customers to whom we might be able to sell said land, if in the market at market price. Please give us your price and terms on said tract, and we will make an effort to sell for you. We once or twice asked Mr. Kellam what your price was, and he said that he did not have it for sale, only the renting of the pasture, and we always prefer to deal directly with the owner, and we thought best to write you and know your prices and terms, and we would make the best sale possible.

In case of a sale, we would charge you our usual commission of 5% for effecting the sale; but if we make no sale, we make no charge.

You will oblige us by giving us your price and terms by return mail.

Yours truly, BARTHOLOMEW & CO.

(Dictated.)

33 Ex. K.

$13,083.33. TOPEKA, KANS., *Mar. 30th*, 1887.

Bank of Topeka, pay to C. K. Holliday or order thirteen thousand & eighty-three $\frac{33}{100}$ dollars

No. — E. P. KELLAM

[Stamped across the face:] Bank of Topeka. Apr. 1, 1887. Paid.
[Endorsed:] C. K. Holliday. The First National bank, Topeka, Kan. Mar. 31, 1887. Paid.

34 In the Circuit Court of the United States for the District of Kansas.

MORRELL C. KEITH, Complainant,
vs.
EDWARD P. KELLAM and C. K. HOLLIDAY, Defendants.

On the application of said defendants, by their solicitors, it is hereby by me ordered that the testimony to be adduced on behalf of said defendants shall be commenced at the United States circuit court room, in the city of Topeka, Kansas, on Thursday, November 3rd, 1887, at 9 o'clock a. m., and proceed thereafter as ordered.

It is further ordered that the complainant's solicitors be notified of this order by service of notice three days before said day of hearing.

LESTER S. WILSON, *Examiner.*

35 In the Circuit Court of the United States for the District of Kansas.

MORRELL C. KEITH, Complainant,
vs.
E. P. KELLAM and C. K. HOLLIDAY, Defendants.

Testimony taken on the part of the defendants, under the 67th rule of practice for the courts of equity of the United States, as amended, by Lester S. Wilson, examiner in equity.

THURSDAY, *November 3rd*, 1887—9 o'clock a. m.

Present: A. Bergen and E. S. Quinton, counsel for complainant; C. B. Smith and John T. Morton, counsel for defendants.

36 C. K. HOLLIDAY, a witness on behalf of the defendants, being by me first carefully examined, cautioned, and solemnly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

Direct examination—questions by Mr. C. B. SMITH:

Q. What is your name, age, and residence?
A. Cyrus K. Holliday; my age is 56 or 57.
Q. What is your residence?

A. Topeka, Shawnee county, Kansas.

Q. How long have you resided in the city of Topeka?

A. Nearly 33 years.

Q. Are you one of the defendants to the bill of complaint in this suit?

A. I am.

Q. Are you personally acquainted with the complainant, Mr. Keith?

A. I am.

Q. When and where did you become acquainted with him?

A. At Topeka, in the years 1856 and 1857.

Q. Have you met him since he lived here?

A. Once or twice—yes, sir.

Q. When was the last time that you remember of meeting him?

A. I could not give that; it is some years ago.

Q. Have you known where he resided since he left Topeka?

A. Generally that he was up in Nebraska or Wyoming—along in that neighborhood.

Q. Have you known that he has prospered in worldly affairs since he has been in Nebraska?

A. That has been from information and understanding that he has.

Q. While you have been acquainted with Mr. Keith have you considered him as a man capable of managing his own affairs?

37 A. I regarded him—I generally regarded him as a good business man—as an excellent business man.

Q. How long have you been acquainted with your codefendant, Mr. Kellam?

A. Since 1857, I believe.

Q. Have you been aware that Mr. Kellam's wife was a distant relative of Mr. Keith's?

A. Yes, sir.

Q. How long have you known that fact?

A. Well, I knew it from the time of their marriage?

Q. What has been your occupation principally in Topeka during your residence here?

A. It is hard to fix a direct occupation with me. I have been connected with railroad interests and gas interests and matters of that sort, and particularly in real estate.

Q. Have you been especially interested in the welfare and prosperity of Topeka as a city?

A. I think that I have, sir; I think I can answer very fully that I have taken a great interest in its prospects.

Q. Have you had any special reasons to be interested in the prosperity of the town?

A. Yes, sir; I had a natural pride in regard to the growth of the city, and, secondly I had large pecuniary interests at stake.

Q. During the years that you have lived in Topeka have you been largely interested in real estate?

A. Yes, sir; considerably so; quite so.

Q. In and about the vicinity of Topeka?

A. Yes, sir.

Q. When was your attention first directed to the piece of property in controversy and who directed it?

A. It is very difficult to me to give a definite answer to
38 that, to the first part of your question, but as to the second part, as to what particularly called my attention there, I suppose there were two facts—that the Ward tract was being opened on the east and settled up, and that the Potwin tract had assumed a shape of going into market and was attracting attention, and this piece of land, lying between the two, necessarily attracted attention among others.

Q. Attracted attention for what purpose?

A. Well, as an addition to the town for a speculative purpose.

Q. When was your attention particularly called to this tract of land?

A. Well, with a view, you mean, of myself becoming interested in it?

Q. Yes, sir.

A. I would say some time in the month of June, 1886.

Q. Up to this time, when you first had in view the advisability of being a purchaser of this property, had there been any large tract or any considerable amount of suburban property sold in the vicinity of Topeka?

A. Well, sir, I think not up to that time. I am not sure whether what is called the Dennis tract was sold at that time or not. That was one of the large tracts, but generally there had not been any large tracts sold up to that time.

Q. What did you first do to carry out your desire of being a purchaser of this property?

A. I prepared an offer to be submitted to Mr. Keith, and handed it to Mr. Kellam and requested him to submit it to Mr. Keith.

Q. Why did you give it to Mr. Kellam?

A. Well, simply from the fact that I knew him to be in correspondence with Mr. Keith, and not knowing definitely Mr. Keith's address myself.

39 Q. What time in June was this that you submitted the offer?

A. That was on the 30th of June.

Q. What, if anything, did you direct Mr. Kellam to do with the offer?

A. Simply to transmit it to Mr. Keith as my offer for the land.

Q. What was that offer?

A. That offer was $40,000 for the southern 40 acres or $60,000 for the whole tract.

Q. What was the result of your making this offer?

A. An acceptance by Mr. Keith of my offer.

Q. Through whom did that acceptance reach you?

A. It came through Mr. Kellam.

Q. Up to the time that your offer was finally accepted by Mr. Keith was there any counter offers made or conditions imposed?

A. Mr. Keith's acceptance, which was under date of July 7, simply said, "I accept that man's offer." Then came——

Mr. BERGEN: At this point I wish to object to what the statement was without the submission of the writing which contained it, and I give notice that I will move to strike out so much of that as relates to what he did say unless the writing is submitted.

Q. Before finishing your answer, colonel, I will show you that paper and ask you to state what it is, and when, if ever, you have seen it before.

A. This is the answer to which I have just referred of Mr. Keith accepting my offer for the land. I have seen it before.

Q. That is your offer of $40,000 for the south 40 acres or $60,000 for the entire tract?

A. Yes, sir.

Q. Do you know Mr. Keith's handwriting?

A. Well, I have to refer back some years upon that matter, and would not like to attempt to identify it in that way.

40 The letter referred to by the witness is here produced to the examiner with the request that the same be copied by him in this testimony, which is accordingly done. The following is the copy:

"JULY 7, 188–.

FRIEND KELLAM: I will take that man's offer if he takes it within a few days. I would rather you would have it.

Yours truly, M. C. KEITH."

Q. You say Mr. Kellam showed you this letter?

A. Yes, sir.

Q. After you had been informed of or saw this letter what was the next step in the transaction taken by you?

A. Nothin- had been said in regard to time or terms of payment, and I therefore then prepared another note and had Mr. Kellam transmit it or the substance of it, asking about what time and terms he would give me in the premises.

Q. After that what was the next that you heard of the transaction?

A. Well, he answered that something like this, that he preferred cash, but would——

Mr. BERGEN: We object to the evidence of the written instrument without producing the written instrument itself.

Q. Witness is here shown paper and asked the following question: Have you ever seen that pape- before?

A. I have.

Q. When did you first see it?

A. Mr. Kellam handed me this as coming from Mr. Keith.

The letter above referred to is here produced to the examiner with the request that it be copied and made a part of defendant's testimony, which is accordingly done. The letter is as follows:

"JULY 29.

DEAR ED.: I will take twenty-five thousand down, the balance to suit you.

Yours truly, M. C. KEITH."

Q. Before the final acceptance or before you saw the letter of July 29th had you seen the paper I now offer; and, if so, who showed it to you?

41 A. Yes, sir; I saw this; it was shown me by Mr. Kellam.

The letter referred to is here produced to the examiner with the request that the same be copied and made a part of defendant's testimony, which is accordingly done. The letter is as follows:

"NORTH PLATTE, *July* 20.

FRIEND ED.: I don't think I want to sell on time, but tell him to make me a proposition and I will tell him what I will do."

Q. After you had inspected this letter of July 20 what did you do?

A. I then submitted another proposition that is in detail——

Mr. BERGEN: We object to the witness stating the contents of such proposition without the production of the paper.

WITNESS: In answer to that I submitted a proposition in detail that I would give—do you want to know what the proposition is?

Q. You need not state that proposition. And after the submission of that proposition you were shown the letter of July 29, which you have before testified to, were you?

A. Yes, sir.

Q. So that about a month intervened from your first attempt to purchase the property before it was consummated?

A. Yes, sir.

Q. I wish you would state, colonel, your views as to the value of this property at the time you made your first proposition which is set forth in the letter of June 30th.

A. I considered that I was making Mr. Keith a very liberal proposition; placing a very high value upon the tract of land.

Q. At the same time you were purchasing it, were you not, for the purpose of making a profit of the transaction?

A. Yes, sir; I was.

Q. Was there any period of time between the 30th of June and the 29th of July during which you were inclined to withdraw from purchasing this property?

42 A. It was a great doubt to me during the whole time as to whether I was making a prudent investment—whether I was not offering more than the property would justify me in offering—and I was in doubt about it all the time.

Q. I wish you would state why that doubt existed in your mind.

Objected to by complainant as incompetent, irrelevant, and immaterial.

A. Well, the purchase, if made, would be purely of a speculative character. It would turn, whether it was a good investment or a bad one, upon the growth and prosperity of the city. If things should happen that the city should not prosper it would become a very bad investment on my hands; but if matters should turn, on the other hand, so as to cause a great prosperity to the city, the investment might become valuable. At that time it was about the turning point as to whether we should get a couple of railroads here, known as the Rock Island and the Three State road, then the K., N. & D., or the Missouri Pacific, as it now is; but I took my chances on the purchase of the land upon the prospects that these roads would come. Had anything happened that the roads did not come I question if the land would have been worth $10,000 today, but they did come, and the result has been satisfactory, so far as that is concerned.

Q. After the contract for the purchase of this land had been made between you and Mr. Keith did you dispose of any interest in the property to any person; and, if so, to whom?

A. I disposed of a half interest in it to Mr. Edward P. Kellam.

Q. About when did you first entertain any proposition to dispose of this half interest?

A. I agreed to let Mr. Kellam in or to dispose of a half
43 interest to him somewhere from—I would say from the 3rd to the 7th of August. He spoke to me some few days preceding that once or twice about it. I could not identify the time exactly, but soon before the 3rd or 7th of August, when I concluded to part with a half interest to him. I would say, giving it more definite, from the very latter part of July along to the 7th of August, when we talked about the matter, and I finally concluded to let him have a half interest in it.

—. What were your reasons for letting Mr. Kellam have a half interest in this property?

Objected to as incompetent, irrelevant, and immaterial and not the proper testimony.

A. Well, the principal and almost the only reason was that the transaction was too large for me to carry alone; that I preferred to have some one share it with me.

Q. Did the mere fact that Mr. Kellam had been a go-between between you and Mr. Keith in the purchase of this property have any influence upon you in selling an interest in it to Mr. Kellam?

A. None at all. Mr. Keith had expressed in that first note there a wish that Mr. Kellam might have an interest in the matter, and in choosing a party to help carry the load with me I would necessarily be anxious, if I may put it in that way, as to the man, and, having known Mr. Kellam long and well, I was perfectly willing that he should be a party to act with me in preference, as I may say, to almost any other party, having known him so long and so well.

Q. What was first said between you and Mr. Kellam in regard to his taking an interest in this property?

A. It would be very difficult for me to state that, Mr. Smith.

Q. Well, give the substance of it. When did he first approach you about it, if he did?

A. I think an answer to that would almost include to a
44 certain extent the answer of the other—that is to say, I was shaky about taking the property, and that he then began to look into the matter with a view of taking the property with me, and following that that we went out to the property several days in succession and made a thorough and complete examination of it, to see whether in the first place I and in the second place he would be justified in joining me to take it at the price, and after these repeated investigations we came to the conclusion that we would venture to take it. I *saw* we because we had concluded that he should take it with me at that time, and the dates I would fix in my mind as to our repeated examinations of the property, close inspection of the property, were the dates that would follow that letter of July 29 and would run up to, say, the 7th or 8th day of August—in the first week of August.

Q. How long did you remain in Topeka after the first of August?

A. I remained until the 9th.

Q. Where did you go to then and for what purpose?

A. I went to Boston to obtain money with which to make the first payment of $25,000 on the land; I might say part of the money.

Q. Did you have any difficulty in procuring the cash to make this first payment?

Objected to as incompetent, irrelevant, and immaterial.

Q. You may go on and state what you did.

A. I struck Boston with a very tight money market and I had difficulty in obtaining it, if that is the point you want.

Q. Why did you go to Boston instead of procuring it in Topeka?

A. Well, I doubted whether so large an amount could be obtained in Topeka, and I was in the habit of obtaining large amounts
45 of money in my business transactions in Boston.

Q. Is it not a fact that in Topeka, regardless of the security that a man has to offer, that he meets with a great deal of difficulty in procuring $25,000 in cash at any one of the various banks?

A. The banks here do not make large loans, as far as my information extends; at least in my own business, where I have had to have large money at times; I could not obtain it here, and therefore had to go East for it.

Q. How long were you East, or when did you return to Topeka?

A. I returned to Topeka, I believe—I can get definite information to answer your question precisely, but I will say I believe—on the 30th of August; the 29th or 30th of August I will place it.

Q. What, if anything, was done by you on your return to Topeka towards carrying out the contract made for the purchase of this property?

A. I immediately procured a New York draft from the First National bank of this city in the sum of $25,000 and handed that to

Mr. Kellam to be forwarded to Mr. Keith as carrying out his proposition to me—that is, the amount of money to be required as first purchase-money upon the land.

Q. Why did you hand it to Mr. Kellam?

—. Simply because this thing had passed through his hands from the beginning. Mr. Keith had sent these papers to him and Mr. Kellam, as I had used—if I may use that word in a respectful way—I had used him in my correspondence with Mr. Keith, and I handed this draft to him, and I might add that I had information from Mr. Kellam that the deed from Mr. Keith was in his possession, to be delivered to me upon the payment of the money.

Q. After turning over this draft to Mr. Kellam did you receive from him the deed to the property?

46 A. I did; yes, sir; I received the deed.

Q. Did you subsequently execute the mortgages for the deferred payments?

A. Yes, sir; two mortgages and notes each of $17,500, making $35,000, which, added to the $25,000 draft, made the $60,000.

Q. I wish you would state whether or not, during the months of July, August, and September, 1886, there was a very rapid rise in the value of property of this character; and, if so, what was the cause of it, according to your opinion.

A. I would not fix the period of the rise in July; it was later than that. I would hardly fix it in August, but perhaps it began in August and through September, October, and November, and so on; there was a rapid rise of property. Did you ask the cause?

A. Yes.

A. The causes were those that I referred to before; it was principally the coming of the Rock Island and of the Missouri Pacific railways. Along about the time that I have fixed the Rock Island had gone to purchasing property in a very liberal and enlarged way both in North Topeka and Topeka proper along the line of First avenue and were making early movements towards the construction of an expensive bridge across the Kaw river. That indicated, as you would say, business on their part, and that, with the assurance *of* the Missouri Pacific or the Fort Scott road would both be in here early that year—that is, the close of that year or early—the beginning of 1887—gave an evidence and assurance to the people of the city that was very remarkable, and the result was a large rise in the value of property in Topeka and surrounding Topeka.

Q. When did you execute the deed to Mr. Kellam for part of this property?

A. The first of September.

47 Q. Was that the day that the deed was completely executed, or was that the day that it was dated?

A. That is the day it was dated. I think it was not delivered that day—it was not delivered that day.

Q. Then by the word execute you do not include delivery, do you?

A. I did not intend to include the delivery.

Q. When was the deed delivered to Mr. Kellam?

A. It was delivered, I am pretty sure—almost dead sure—on the 19th of September. I understand the word execute the matter of preparing for delivery.

Q. What was the actual consideration from Mr. Kellam to you for this deed—what did Mr. Kellam agree to do for that?

A. I let Mr. Kellam into the transaction to share and share alike with me—that is to say, to be the half purchaser; therefore his consideration would really be $30,000.

Q. Was he to assume and did he assume the payment of half of the deferred payments on this property?

A. He assumed the payment of half of the deferred payments on the property and he agreed to pay me half of the $25,000 already paid by me, with such interest as I might have to pay upon that $25,000.

Q. Do you remember what the consideration mentioned in your deed to Mr. Kellam was?

A. I believe the consideration is but one dollar—I have not refreshed my mind by looking at the deed since—together —, in the closing part of the deed, an assumption of the payment of half of the $35,000.

Mr. BERGEN: We would like to have a copy of the deed or the deed submitted to the examiner.

The deed referred to is here produced, and copy of the same is offered in evidence and made a part of witness's deposition. The deed is as follows:

48 This indenture, made this first day of September, A. D. 1886, between Cyrus K. Holliday and Mary D. Holliday, his wife, of Shawnee county, in the State of Kansas, of the first part, and Edward P. Kellam, of Shawnee county, in the State of Kansas, of the second part, witnesseth:

That said parties of the first part, in consideration of the sum of one dollar, the receipt whereof is hereby acknowledged, do by these presents grant, bargain, sell, and convey unto said party of the second part, his heirs and assigns, all the following-described real estate, situated in the county of Shawnee and State of Kansas, to wit: The undivided one-half of the east half of the southeast quarter of section number twenty-five (25), in township number eleven (11) south, of range number fifteen (15) east; also a part of the east half of the northeast quarter of said section, described as follows: Commencing at the southeast corner of said northeast quarter, thence running north thirteen (13) rods; thence, at a right angle, west one-fourth of a mile; thence, at a right angle, south thirteen (13) rods; thence, at a right angle, east to the point of starting.

This deed is made subject to a mortgage from said grantors to Morrell C. Keith for the sum of $35,000, securing two notes of $17,500.00 each, dated August 19, 1886, drawing interest from date at six per cent. per annum, the first due on or before one year and the second due on or before two years from said date.

The said party of the second part assumes and agrees to pay one-

half of each of said notes, with accruing interest, as part of the consideration hereof:

To have and to hold the same, together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in anywise appertaining, forever; and said Cyrus K. Holliday and Mary D. Holliday, his wife, for themselves and their heirs, executors, or administrators, do hereby covenant, promise, and
49 agree to and with said party of the second part that at the delivery of these presents they are lawfully seized in their own right of an absolute and indefeasible estate of inheritance in fee simple of and in all and singular the above granted and described premises, with the appurtenances; that the same are free, clear, discharged, and unincumbered of and from all former and other grants, titles, charges, estates, judgments, taxes, assessments, and incumbrances of what nature or kind soever except the half of said mortgage as aforesaid, and that they will warrant and forever defend the same unto said party of the second part, his heirs and assigns, against said parties of the first part, their heirs, and all and every person or persons whomsoever lawfully claiming or to claim the same.

In witness whereof the said parties of the first part have hereunto set their hands the day and year first above written.

C. K. HOLLIDAY.
MARY D. HOLLIDAY.

STATE OF KANSAS, } ss:
Shawnee County, }

Be it remembered that on this first day of September, A. D. 1886, before me, the undersigned, a notary public in and for the county and State aforesaid, came Cyrus K. Holliday and Mary D. Holliday, his wife, who are personally known to me to be the same persons who executed the within instrument of writing, and such persons each duly acknowledged the execution of the same.

In testimony whereof I have hereunto set my hand and affixed my notarial seal the day and year last above written.

WM. HALL JENKINS,
[SEAL.] *Notary Public.*

Term expires Jan'y 23, 1890.

Entered in transfer record in my office this 20th day of Sept., A. D. 1886.

D. N. BURDGE,
County Clerk.
C. H. TITUS, *Deputy.*

STATE OF KANSAS, } ss:
Shawnee County, }

This instrument was filed for record on the 20th day of September, A. D. 1886, at 11.30 o'clock a. m., and duly recorded in Book 125, on page 336. Fee, $1.20.

[SEAL.]

J. BURGESS,
Regi-ter of Deeds.

50 Q. Why was the consideration placed at one dollar instead of the actual consideration, if you know?

A. Well, I suppose it was a little notion of my own—that I did not want—that is, in making a deed to Mr. Kellam I took the view I should only make a quitclaim to him; that the title to the property had not been fully cleared, and that I should not warrant to him any more than I was getting in the matter, and not make a stronger conveyance to him than had been made to me—that is, Mr. Keith not having cleared his title, I did not want to take and assume to Mr. Kellam more than I was getting.

Q. At this time was there a little cloud upon this title?

A. Yes, sir.

Q. Were you endeavoring to have it removed?

A. Yes, sir.

Q. Was it at anybody's suggestion that the consideration was mentioned at a dollar instead of the actual consideration?

A. It was.

Q. At whose suggestion was it?

A. At the suggestion of Howell Jones.

Q. What is Howell Jones's business, and what had he to do with this transaction?

A. He was examining the abstract so as to pass judgment upon it in my interest in regard to the title. His business is an attorney in this city, and he gives special attention to the examination of abstracts of title.

Q. After the contract for the purchase of this property had actually been made, but before the papers had been all executed and the deeds and mortgages had completely passed, was there any applications made from parties to purchase this property; and, if so, who were they?

A. I know of none. There were no propositions made to purchase the property from me until after the 20th of Septem-

51 ber, when the whole transaction was closed by the papers being put upon record.

Q. Do you know Mr. Watson, a real-estate dealer in this town?

A. I do. George W. Watson, you mean?

Q. Yes.

A. Yes, sir; I know him.

Q. Did he apply to you to purchase this property?

A. He did not to myself personally.

Q. Did you receive through Mr. Kellam's hands an application from him?

A. I knew of the application in that way coming to Mr. Kellam and from Mr. Kellam to me; yes, sir.

Q. At the time of this application were you and Mr. Kellam the owners of this property?

A. Yes, sir.

Q. Was this application in writing?

A. It was.

Q. Did you see it?

A. I saw it. I am very sure that I saw it. Mr. Kellam offered it to me in that form.

Q. What was done with it?

A. I do not know what became of it. I have searched very diligently for it, thinking that I might have it and desiring very much indeed to obtain it.

Q. Why was it given to you?

A. I am not sure that it was given to me. It was exhibited to me. I am not sure whether I kept it or whether Mr. Kellam retained it. I have examined among my papers hoping to find it, but I have not been able to do so.

Q. What was this proposition?

A. You mean the amount of the offer?

52 Q. Yes.

A. Ninety thousand dollars.

Q. Was there any other proposition made to you for the purchase of this property by parties, or did you receive any other proposition through Mr. Kellam or any other person?

A. Yes, sir; one or two more. I would like you to define the dates, though.

Q. After the month of September, 1886?

A. There were, and I want particular, with reference to this offer of Mr. Watson, to fix the time—that it was after the 20th of September when his proposition was submitted. I want that particularly, and that was my anxiety to find the written proposition itself, if it was dated, to show that it was positively after the 20th of September; then following that and answering your question now—following that, in October and November and December, some other propositions were submitted.

Q. During October and November and December the property had increased materially in value, had it not?

A. It was increasing in value right along through those months—not it alone; there was this boom that was on in Topeka—the beginning of the boom that culminated in the next February or March.

Q. During the negotiations for the purchase of this property or any time after you had made up your mind to purchase it did you suppose or had you any reasons to suppose that Mr. Kellam was the agent of Mr. Keith to sell this land?

A. I did not suppose that he was the agent, neither before then or since—that is, the agent of Mr. Keith to sell this land; hence I paid no attention to Mr. Kellam in this matter and submitted my propositions directly to Mr. Keith through Mr. Kellam.

Q. None of your propositions, then, were addressed to Mr. Kellam as the agent of Mr. Keith, were they?

53 A. None at all whatever—in no sense whatever.

Q. What did you understand Mr. Kellam's relationship to this land was?

A. Why, nothing more than to have, as we would commonly say, an eye on it in a friendly way for his relative, just like I would use

my friend Judge Morton as my relative to look after a similar interest.

Q. Did you understand that Mr. Keith was paying him or that Mr. Kellam was agent for compensation to sell this property?

A. As far as a man can know those things, I knew that he was not—I mean a man related to Mr. Kellam as I was for a long term of years that way, and knowing more or less about his business.

Q. Mr. Holliday, you are charged with entering into conspiracy in the bill of complaint with Mr. Kellam to purchase this land at an inadequate price. I wish you would state if there is a shadow of truth in that allegation in any respect.

A. There is not a shadow of truth in that allegation in any respect whatever, neither in thought or word or deed.

Q. Was there any concealment, or did you seek in any way, through Mr. Kellam or otherwise, to overreach the complainant in the purchase of this property?

A. In no respect whatever. The history of my life, of the 55 years that I have lived, shows that I have overreached no man, and I would not commence now.

Mr. BERGEN: We would move to strike out the answer of witness to the last question.

Q. Had you any reasons to suppose, during your transactions for the purchase of this property, that Mr. Keith was not fully and completely advised as to the value of the property?

A. I would simply say that I have every reason to believe that Mr. Keith fully understood the value of his property. He is so intelligent a man and so fine a business man that it is almost impossible to conceive otherwise.

54 Q. Was there any understanding or agreement or arrangement of any kind, directly or indirectly, between you and Mr. Kellam that Mr. Kellam should make any representations to Mr. Keith as to the value of this property, or should conceal from Mr. Keith the value of it, or should fail *or* advise *to* submit to Mr. Keith other applications for the purchase of this property made to Mr. Kellam?

A. None whatever.

Q. Were all your dealings with Mr. Keith conducted by you with the same openness and fairness as they would have been if Mr. Keith had been personally present with you at these negotiations?

A. Exactly in the same manner precisely—open and aboveboard.

Q. Was there any arrangement or understanding or agreement between you and Mr. Kellam that he should have any interest in this land at any time until such arrangement was made between you and Mr. Kellam at the time you finally purchased the property?

A. None whatever until this, as I identify the time, along about the first of August—the first to the 7th of August.

Q. What time was it that the first suggestion was made by Mr.

Kellam to become interested in this property, as near as you can fix it?

A. As near as I can fix it I would make that time, as I once before answered, the very last days of July—somewhere from the 27th of July to the first of August—along there was the time that he spoke to me. He may have done so a day or two before—incidentally referred to it—but the day, as it were, that we got to talking about the matter was then.

Q. When, as a matter of fact, was it that Mr. Kellam finally reimbursed you for the cash advanced by you to buy this property?

A. If I had my journal here I could give you the hour and minute almost. I think—I am very sure that it was the 30th of

55 March, 1887.

Q. Did he pay you for the interest on his share up to that time?

A. He paid me $12,500 for the principal and $583.33, being the interest—I am giving this by recollection, but I am very sure I am correct—which would be the full amount of interest at 8 per cent. from the time that I made the payment, on the 30th of August, to the time that he paid me, on the 30th of March, and the same interest that I was paying.

Q. Have you ever seen the complainant, Mr. Keith, since you purchased this property?

A. No, sir; I have not.

Q. When did you first become aware that he had become dissatisfied with this sale? Was it the filing of the bill in this case?

A. I will say that the day after the beginning of this suit I received a telegram at Santa Monica, California, from Mr. Kellam advising me of the beginning of this suit, and that is the first intimation that I had that Mr. Keith was not perfectly satisfied with this whole transaction.

Q. Has Mr. Keith ever restored to you or offered to restore to you the cash payment made or tendered or offered to tender to you your notes and mortgages given to secure the deferred payments on this purchase?

A. Never.

Q. Where were those notes made payable for the deferred payments?

A. At the Omaha National bank, in Omaha, Nebraska.

Q. When did the first one of them mature?

A. On the 19th day of August, 1887.

Q. Did you pay it?

A. I did.

56 Q. How?

A. By transmitting a New York draft for the sum of $19,600, which was a sum sufficient to pay the one-year note, interest in full upon the one-year note, and interest upon the two-year note for the period of one year from the 19th of August, 1886, to the 19th of August, 1887.

Q. To whom did you transmit this draft, and with what instructions?

A. I transmitted it to the Omaha National bank, with instructions in detail in full to notify Mr. Keith that the money was there to pay the note and to pay the interest as I have just suggested—to pay the first note.

Q. Have you ever received back that money?

A. I have not.

Cross-examination—questions by Mr. BERGEN:

Q. What do you now consider the value of the land deeded to you by Mr. Keith?

A. That is a very strange question. I don't think to-day that I would want to pay for it what I paid then.

Q. Are you willing to accept a return of all the money which you have paid and the notes which you have given, with interest on the money, and reconvey the land?

A. No, sir; I am not. I do not do business in that way.

Q. You say, do you, that you know, as far as a man can know, that Mr. Kellam was not Mr. Keith's agent for the sale of this land?

A. Yes, sir.

Q. And that your relations with Mr. Kellam were very intimate for a number of years, and that you knew more or less about his business during that time?

A. Yes, sir.

Q. During the last five years has Mr. Kellam acted as your
57 agent in many matters?

A. Oh, no, sir; I will say like this: I have a little notice upon my door that when I am absent parties wanting to pay money can pay it to Judge Clark or Mr. Kellam.

Q. For the last five years Mr. Kellam has been in the habit of receiving money for you, has he not?

A. Yes, sir; in that way.

Q. Receiving it for rents, has he?

A. Yes, sir.

Q. Upon contracts for lands which you have sold and other monies due to you?

A. Yes, sir; that is a convenience, you know, to the parties who wish to pay and stop interest to give them a chance to pay that way—to Judge Clark or Mr. Kellam or to Mr. Collier in the office—any of them. I mean the gas office.

Q. Mr. Kellam is in the employ of the gas company, is he not?

A. Yes, sir.

Q. How long has he been in such employ?

A. I don't know; three or for years, I think.

Q. The gas office adjoins your private office, does it not?

A. Yes, sir.

Q. With only a door between them?

A. That is all.

Q. Communicating from one to the other?

A. Yes, sir.

Q. Mr. Kellam was very frequently in your office, was he not?

A. He would be whenever there was any occasion to come. The door was wide open.

Q. You were in the office where he was?

A. Yes, sir.

58 Q. During all that three or four years you have been president of the gas company, have you?

A. Yes, sir.

Q. And have been the largest stockholder in the company, have you not?

A. I am the largest stockholder in the company.

Q. Owning more than half the stock?

A. I believe I do; yes, sir.

Q. How long since you have seen Mr. Keith?

A. I answered that before—that I could not tell; it was a good many years ago.

Q. Do you know of his having been in this State within the last fifteen years?

A. I only know in this way, that I believe in some of these papers that he himself stated that he had been here about fifteen years ago. I do not know of my own knowledge in regard to the matter.

Q. At the time these negotiations were commenced were you not informed—was it not your belief that he had not been here for a considerable period of years prior to that time?

A. I think that is so; yes, sir.

Q. You knew the land which was deeded to you and had known it and seen it frequently, had you not, before the conveyance to you or before these negotiations were entered upon for the land?

A. Oh, I had seen those lands for the thirty years that I have lived here, off and on, you know. At the time I might say that I made this proposition I looked at the land before I made it with reference to that time.

Q. Were you in company with Mr. Kellam at that time?

A. No, sir; not in regard to my first proposition. I went there, it was rather early, and visited through Potwin place, a trip that I took out there, and looked over incidentally into these lands.

59 Q. What was the situation of these lands in controversy at that time as to improvements?

A. They had no improvements whatever.

Q. Were they not enclosed with a fence?

A. Oh, yes; a mere fence. Yes, sir; that was all. Of course you mean the Keith tract?

Q. Yes, sir. Were you not informed that Mr. Kellam had fenced the Keith tract?

A. Yes, sir; I knew in regard to the fence.

Q. And that Mr. Kellam had fenced it?

A. Yes, sir; when I said improvements I thought you meant houses or planting trees or grading the streets, something like that.

Q. Had you any knowledge that Mr. Kellam had fenced it up for Mr. Keith, or any information?

A. Well, I had—that is to say, I knew that Mr. Kellam had past-

ured cattle there and that he was taking care of the fence and of the property in return, as it were, for the pasturing of the cattle.

Q. At the time that you first looked at it were there any improvements made by a base-ball club on it?

A. Well, sir, I am not sure whether that base-ball club was on there before or soon after; I am not sure in regard to that.

Q. Was it there when you made your offer for the land?

A. I don't remember that, Judge.

Q. Were you aware then that Mr. Kellam had rented the ground to the base-ball club—part of the ground?

A. At the time that I made the purchase I knew that the base ball was there, but as to when they went on there I don't know the date.

Q. But when you made your first offer did you not know
60 that Mr. Kellam had rented them a few acres for base-ball purposes?

A. I don't remember whether I did or not. I don't remember whether they were on or not.

Q. You don't remember whether the improvements, the high fence and the seats with a roof over it, were there at that time or not?

A. I don't remember whether they were there or not, but I would not regard it as a valuable improvement if they were. They are just there for a few months, and I would just as soon tell you if I knew whether they were there or not at that time. I regarded them as but very little improvement.

Q. I would like to know whether Mr. Kellam had leased the ground to them at that time or not.

A. I don't know. Some time or other I understood that he had leased the ground to the base-ball people—that is, he gave them the privilege of using the ground for base-ball purposes.

Q. But you knew that he had the land in charge and under his control, so far as its use was concerned?

A. If you want to get at a point like this, as to whether there was a base-ball party there, whether Mr. Kellam was the party that made the lease, I will say without any doubt he did, but yet I know nothing about it.

Q. If they were there you would have concluded at once that Mr. Kellam had allowed them to go there?

A. I would.

Q. Knowing that he was in charge of the land?

A. No, sir; I don't know whether they were there or not, but I think naturally Mr. Kellam was a man that would let them go on there if they were there.

Q. Had you been informed as to his representing Mr. Keith in the matter of recovering right-of-way damages from a railroad which went over a part of this land at the time these nogotia-
61 tions were commenced?

Objected to as incompetent, irrelevant, and immaterial and not proper cross-examination.

A. I think I have ascertained all that as incidents growing out of my purchase. I think that I—I question whether I knew it before. In other words, when I would come to make the purchase I would find the railway track through there, and still the circumstance about how the Topeka, Salina and Western, as it was then—how it got through there—if you would ask me how I knew it I would hardly be able to tell you, only that I know that the Rock Island has a right of way through the land.

Q. At the time of the commencement of these negotiations had you known of any proceedings to obtain a county road through the Keith tract?

A. At the time of my negotiations?

Q. Yes.

A. I think I knew nothing about that only as incidental to this suit. In regard to that county-road business I think I knew nothing of that only as incidental to the purchase of that land. I knew that the Rock Island had a right of way, as they took out so much of the land, but in regard to the county road, as I say, I think I knew nothing of the county road only as it developed here in the progress of this suit.

Q. Did you know last June that Mr. Kellam had been representing Mr. Keith in the payment of the taxes upon that tract for a number of years?

A. Yes, sir; I knew that he had been paying the taxes for Mr. Keith.

Q. During all the negotiations between yourself and Mr. Keith did Mr. Kellam show to you before he sent them the letters which you supposed he sent to Mr. Keith relative to the matter, and exhibit to you the letters which Mr. Keith sent to him as
62 soon as practicable after their receipt?

A. Yes, sir; he exhibited the letters. He generally made his letters from data that I furnished him; then he would incorporate that data either directly in my own language or such as he might choose to adopt in the case and covering the same, and exhibit those letters to me, and immediately upon the receipt of Mr. Keith's answers he would exhibit them to me also.

Q. Did you at any time before the first of August, 1886, know that Mr. Kellam had ever previously thought of purchasing this land himself?

A. I think in the fall of 1885 Mr. Kellam was at Omaha, and upon his return he stated to me that he had made Mr. Keith an offer for that land.

Q. Did he state how much he had offered for it?

A. I think he said he had offered him $40,000; I think that was the statement that he made.

Q. After the fall of 1885 had not many lots been sold and many buildings erected in Potwin place, which lies beyond the Keith tract?

A. By inquiry the other day I answer your question that way; I understand that there were four buildings erected and in process of erection up to January, 1886.

Q. Do you know how many there were built or commenced there before June 30th, 1886?

A. I think there was some ten or twelve more—eight or twelve more; something like that.

Q. All good two-story dwellings?

A. Fair houses; yes, sir; fair houses for what would be considered an addition that way; yes, sir.

Q. Was it not the understanding at that time that many more lots had been sold in that addition for residence purposes?

A. That I do not know.

63 Q. Was it not your belief and information that many other lots had been sold there?

A. I knew they were selling lots there; yes, sir; but to what extent I do not know. I do not think I ever had a word with their agent, Mr. Bartholomew, or with Mr. Potwin, so what I give was my observation, and as I understood from my examination there was one of the reasons that I was disposed to make an offer for the land that Potwin place was building up.

Q. Mrs. Ward's land, on the east side of the Keith tract, had also been built up in the meantime, had it not?

A. Yes, sir; that was built up also—the southern part of Mrs. Ward's land.

Q. There was a school-house upon it—upon lands adjoining the Keith tract?

A. I don't know whether there was a school-house or not; the southern part was built up.

Q. And the town was also built up upon the south side of the Keith street, was it not?

A. Why, yes, sir; and those were the considerations that induced me to offer $60,000. If it had not been for this I certainly would not have given half the money for the land; those with the other considerations I spoke of—like the Rock Island and Fort Scott road.

Q. Did you know at what time the election was held in Topeka to give bonds to the K. N. & D. Railroad Company, since the Missouri Pacific?

A. No, sir; I do not.

Q. Was it not as far back as the month of March or April, 1886?

A. I think it is likely it was; I don't remember.

Q. And was it not your understanding that the company had agreed to build here?

64 A. I have said that already; that it was my expectation that the road would be built and that the Rock Island would be built. I do not just remember when the bonds were voted upon which I predicated the purchase of the land at all.

Q. And before your offer had not the K. N. & D. Railroad Company commenced building towards this place?

A. I think so, sir.

Q. And before your offer had not the Rock Island Railroad Company commenced building towards this place?

A. They had commenced building in a southwesterly direction, but it was questionable whether they were coming to Topeka or not.

Q. Was it not your understanding that at that time they had agreed definitely to come to Topeka?

A. I can hardly answer that, but if there had not been a pretty strong assurance in my own mind that they would come here I would not have bought that land. In a business way I took my chances. As they have come, as I said in my direct testimony, I am satisfied with the purchase, and if they had not come I would have been badly in the swamp; there is no doubt about that at all, and that is what I understand to be buying land on speculation; taking my chances on whether I am going to get out or not.

Q. You are and were at that time a director in the Santa Fé Railroad Company, were you not?

A. Yes, sir.

Q. And studied the matter of railroads considerably, gave them thought and attention, and read the newspapers concerning them.

A. Yes, sir.

Q. And obtained all other information that you could by private inquiry of individuals.

A. I was never lucky in getting information from private individuals. Railroads have been a part of my business, as I said
65 in my first direct testimony.

Q. Before the offer was made were you not informed and did you not believe that the Rock Island Railroad Company had commenced the purchase of ground here for their use?

A. I am very sure they had not commenced purchasing. I happened to learn that incidentally yesterday in the matter, and if you want to know why I can give it to you. They positively had not commenced to purchase at the time I made the offer for the land. It was still a question at the time I made the offer for the land whether they were coming to Topeka or whether they were going six or eight or nine miles west of us.

Q. But you then formed the belief that it would come here?

A. I took my business chances upon that matter; you have struck it.

Q. I asked you if you did not believe it was coming here.

A. Speaking in regard to my information in regard to railroads, I did not conceive that a great and enlightened railroad corporation such as the Rock Island railroad would do so suicidal a thing as to build a railroad *with* eight miles of the capital of the State and not go there, and I acted upon what I believed would be the ultimate result of that matter; but at that time, on the other hand, they were not purchasing property at that time, and I had no intimation that they would purchase property or come here. It was on that simple proposition that an intelligent and business-like corporation like the Rock Island railroad could hardly do so suicidal a thing as to go around Topeka.

Q. Had you not been informed that they had agreed to come here, to build their road here?

A. I can hardly answer that, but I have been informed so often in regard to other railroads coming to Topeka and that never came that I would take very little stock in information of that sort, and I would rest it rather upon the idea of pure business of their
66 coming here or running around us.

—. Then you did believe they would come here?

A. That is the reason I purchased the land. As I said, if I had believed that the road would not come here I would not have given half what I did for this land. I supposed the land would increase in value rather than decrease or else I would not have bought it. I am not so big a fool to have purchased it if I had not thought it would increase in value.

The further taking of this testimoney is here adjourned until 1.30 o'clock p. m. of this day, Nov. 3rd, 1887, at the same place.

LESTER S. WILSON, *Examiner.*

Parties met pursuant to adjournment.

Present as in the forenoon, and the cross-examination of C. K. HOLLIDAY was resumed as follows:

Q. Did you say in your examination-in-chief that the agreement between you and Edward P. Kellam that he should have an interest in this land was made between you and him between the last of July and th- 7th of August, 1886?

A. Yes, sir.

Q. How long before that time had the matter of his getting an interest in that land been mentioned by either of you to the other?

A. Not but a day or two; two or three days at the most.

Q. Did you express a desire or a suggestion to Mr. Kellam that he should take an interest in the land before he expressed any desire to do so to you?

A. I think it came from Mr. Kellam first to me.

Q. On what day did you deliver the draft of $25,000 to E. P. Kellam?

67 A. It was either the 30th or 31st of August; the 30th, I believe.

Q. And at the same time he delivered to you Mr. Keith's deed of the land to you?

A. He did; yes, sir.

Q. You executed the deed to Mr. Kellam on the first day of September?

A. Yes, sir.

Q. Did Mr. Kellam know on that day that you had executed it?

A. On which day—on the first of September?

Q. Yes.

A. Yes, sir—that is, that I had a deed fully prepared for delivery.

Q. Signed and acknowledged?

A. Yes, sir.

Q. But it had been agreed between you a month before that time that he should be let in for a share in the land?

A. Well, approximately a month before; some time before; the 7th or 8th of August, as I have said.

Q. Did Edward P. Kellam at any time before the first of September pay you any money for the share which he was to receive in this land?

A. Before the first of September?

Q. September, 1886; yes, sir.

A. No, sir.

Q. Did he pay you any money upon that at any time during the month of September, 1886?

A. No, sir.

Q. Was there any written agreement between you and him relative to his having an interest in this land at any time before the 20th of September?

A. Yes, sir.

68 Q. Other than this deed?

A. Yes, sir.

Q. Signed by both of you?

A. Yes, sir.

Q. What was the date of that agreement?

A. The 1st of September.

Q. Was it executed and signed on that date by both of you?

A. Yes, sir.

Q. Did you take the abstract of title to this land to Howell Jones for examination?

A. Well, I am not just sure about that. I am disposed to think that I did in the first place, but, in the second place, when we were there upon a final examination, Mr. Kellam was along.

—. Mr. Kellam may have taken it at that time?

A. No; it was left there. We were waiting then for the Bushman release, and it was left in the hands of Mr. Jones, and I think I took it up to him in the first place myself.

Q. You are sure of that?

A. I am not absolutely sure, but pretty sure.

Q. You were informed that Mr. Keith had sent this deed to Mr. Kellam, and that Mr. Kellam had it in his possession for you—the deed of the land to you?

A. I got information of that in the city of Boston. The deed was prepared to be sent to him when I started for Boston, on August 9th, and I was arranging for the money there, and not knowing but that at any minute the transaction might stop—that is to say, that Keith might refuse to go on with the trade—I therefore did not want to close for my money in Boston until I knew positively that the trade was going to be completely consummated, and so I waited in Boston until the deed was sent to Mr. Kellam and Mr. Kellam telegraphed me to that effect—that he had the deed in his possession.

69 Q. Had you made your mortgages to Mr. Keith at the time when the deed was delivered to you?

A. Yes, sir.

Q. Was there any agreement between you and Mr. Kellam relative

to the time when the deed to you and your deed to Mr. Kellam should be recorded?

A. No, sir; I suppose they would all have been recorded right then and there at that time, but Bushman's release had not come on yet, and they were withheld until we could get the release of the property and get the property clear.

Q. Did you go with him at the same time to the register's office to record your deed and the deed to him?

A. Well, I am disposed to think not, Judge. I would as soon have done it as not, but I am disposed to think I did not. I went and took my deed down to the register's, and some time afterward he took his.

Q. Do you remember of seeing him in the register's office while you were there with your deed?

A. I do not. I would just as soon say so as not if I had, but I don't remember in regard to that matter.

Q. Do you remember shortly after this suit was commenced of having had a conversation on a railway train in the southern part of Kansas with Judge D. A. Harvey, of this place?

A. Can you go further and and tell what the substance of that was?

Q. In which the matter of the purchase of this land was mentioned. Do you remember of having a conversation with him?

A. I do not. I don't know whether I ever met D. A. Harvey on a railway train. I might have done it. I meet a great many people on railway trains.

Q. In the southern part of the State along the latter part of the winter or first of last spring?

70 A. If I could refresh my memory by dates or memoranda I might be able to tell what it was, but I could not say. I meet a good many people on railroad trains and I could not remember all — meet.

Q. This was only some eight or nine months ago that I ask you as to. Do you remember in that conversation of saying to him that, or substantially that, Ed. was a fool, and that there would have been no trouble if he had not insisted on recording his deed?

A. I never said it in the world.

Q. Or that he was very cautious and was not willing to trust you with the title, as he ought to have been?

A. I never said anything of that sort in the world, and Judge Harvey has no right, if he had such a conversation with me, to consider anything that I might say or give it an interpretation like that at all. Of course it would be the furthest from my thoughts to say any such thing.

Q. Then you had no harsh feelings towards Mr. Kellam in any way concerning the transaction?

A. No, sir. Why should I have?

Q. I don't know.

A. Well, I don't.

Q. You did not express nor feel that he had acted unwisely in the matter in any way?

A. Not at all—no, sir; the only harsh feelings I have is in regard to some other persons in town—that I may get a chance to play back on after awhile—but certainly not any towards Mr. Kellam.

Q. When George W. Watson's offer of $90,000 for the land was brought to your notice did you then or afterwards mention any price or make any offer at which you would sell the land?

71 A. I think not then; I think not then, because it was new, and we had not fixed upon any price in the matter. It may be that I did afterwards, but not then I am pretty sure, just at that time.

Q. Within two years before your purchase of this land or since did you buy any other land at or near Topeka?

A. No, sir; I think not. I bought no land outside, and I was just hesitating to think whether I had bought any lots in town, but I think not.

Redirect examination—questions by Mr. SMITH:

Q. You have stated in your cross-examination, in response to a question asked you by Judge Bergen whether, if the complainant should tender you back the money and the notes and mortgages, you would take them or not, that you did not do business that way. I would ask you if you had any other reason besides that why you would not rescind the sale?

A. Well, I have a little pride of character in a transaction of that sort and a little reputation at stake that I would like to maintain, but, in addition to that matter, by doing so would be a half confession that there was a wrong done in this matter, and I could not consent to that for a minute. I have done no wrong to Mr. Keith or any other man that I know of, and I do not want to make what would be a half confession of wrong; and, as a matter of right, Mr. Keith has no more right to demand that property back of me than what Bushman would have to come in and ask to have that land go back to him for a couple of bull oxen that he traded for the land, and it has not risen one-tenth part as much on my hands, if it has risen at all, as it raised on his hands after his purchase from Bushman.

Q. You have stated in response to a question by complainant's solicitor that the Rock Island road was located through this land in the summer of 1886. Did you mean by that that the Rock Island road itself was in there, or that they are now running over the right of way of a former road?

72 A. If I stated the Rock Island it would technically not be the proper answer; it would be the Topeka, Salina and Western that had been located through there, and that has been subsequently acquired by the Rock Island. I did not notice that if I did make such an answer.

Recross-examination—questions by Mr. BERGEN:

Q. Have you with you the deed which you mention in your

first examination-in-chief of the complainant, M. C. Keith, to yourself?

A. No, sir; but I have it where it is accessible, so it could be gotten.

The deed above referred to is here produced to the examiner, and a copy of said deed is here offered in evidence and made a part of the witness's deposition, which deed is in words and figures as follows:

73 This indenture, made this 19th day of August, A. D. 1886, between Morrell C. Keith, a widower and unmarried, of Lincoln county, in the State of Nebraska, of the first part, and Cyrus K. Holliday, of Shawnee county, in the State of Kansas, of the second part, witnesseth: That said parties of the first part, in consideration of the sum of sixty thousand ($60,000) dollars, the receipt whereof is hereby acknowledged, do by these presents grant, bargain, sell, and convey unto said party of the second part, his heirs and assigns, all the following-described real estate situated in the county of Shawnee and State of Kansas, to wit: The east half of the southeast quarter of section number twenty-five (25), in township number eleven (11) south, of range number fifteen (15) east; also a part of the east half of the northeast quarter of said section, described as follows:

Commencing at the southeast corner of said northeast quarter, thence running north thirteen (13) rods; thence at a right angle west one-fourth of a mile; thence at a right angle south thirteen (13) rods; thence at a right angle east to the point of starting:

To have and to hold the same, together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in anywise appertaining forever;

And said Morrell C. Keith, for himself and his heirs, executors, or administrators, does hereby covenant, promise, and agree to and with said party of the second part that at the delivery of these presents he is lawfully seized in his own right of an absolute and indefeasible estate of inheritance in fee simple of and in all and singular the above granted and described premises, with the appurtenances; that the same are free, clear, discharged, and unincumbered of and from all former and other grants, titles, charges, estates, judgments, taxes, assessments, and inci-brances, of what nature or kind soever,

74 subject, however, to all the rights and right of way of the Topeka, Salina and Western Railroad Company as now located over and across said premises or any portion thereof, and that he will warrant and forever defend the same unto said party of the second part, his heirs and assigns, against said party of the first part, his heirs, and all and every person or persons whomsoever lawfully claiming or to claim the same.

In witness whereof the said party of the first part has hereunto set his hand the day and year first above written.

MORRELL C. KEITH.

WM. NEVILLE.

STATE OF NEBRASKA, } ss:
Lincoln County, }

Be it remembered that on this 19 day of August, A. D. 1886, before me, the undersigned, a notary public in and for the county and State aforesaid, came Morrell C. Keith, an unmarried man, who is personally known to me to be the same person who executed the within instrument of writing, and such person duly acknowledged the execution of the same.

In testimony whereof I have hereunto set my hand and affixed my notarial seal the day and year last above written.

WM. NEVILLE,
Notary Public.

[SEAL.]

Term expires Sept. 28, 1889.

THE STATE OF NEBRASKA, } ss:
County of Lincoln, }

I, J. E. Evans, clerk of said county of Lincoln and clerk of the district court therein, being a court of record and having a seal, do hereby certify that William Neville, whose name is subscribed to the jurat, certificate, or proof of acknowledgment of the annexed instrument, was, on the 28th day of Sept., in the year of our Lord 1883, duly appointed and commissioned a notary public within and for said county for the term of six years, and that his commission expires on the 28th day of Sept., A. D. 1889.

In testimony whereof I have hereunto set my hand and
75 affixed the seal of said court, at North Platte, Nebraska, this 19 day of August, A. D. 1886.

[SEAL.]

J. E. EVANS, *Clerk.*

Entered in transfer record in my office this 20th day of Sept., A. D. 1886.

D. N. BURDGE,
County Clerk.
C. W. TITUS, *Deputy.*

STATE OF KANSAS, } ss:
Shawnee County, }

This instrument was filed for record on the 20th day of Sept., A. D. 1886, at 10.20 o'clock a. m., and duly recorded in Book 125, on page 335.
Fee, $1.10. P'd.

J. BURGESS,
Register of Deeds.
C. K. HOLLIDAY.

76 E. P. KELLAM, a witness on behalf of the defendants, being by me first carefully examined, cautioned, and solemnly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

Direct examination—questions by Mr. SMITH:

Q. What is your name?
A. Edward P. Kellam.
Q. What is your age?
A. 55 years.
Q. Are you one of the defendants in this case?
A. I am.
Q. Are you the same Edward P. Kellam that was produced as a witness for the complainant some two or three weeks ago, and testified at that time?
A. Yes, sir.
Q. Were you expecting to have been put upon the stand and to have testified at that time?
A. No, sir; I was not.
Q. At the time you then gave your testimony had you recalled to your mind all the matters touching the matter in controversy in this suit?
A. No, sir; I had not.
Q. In response to a certain question asked you by complainant's solicitor at the time of your being unexpectedly called upon the stand to testify on behalf of the complainant, which question was as follows: "At that time what consideration had you paid or given to C. K. Holliday for his deed to you," you replied: "I have given nothing; the consideration was in the deed—only my obligation in the deed." I will ask you to explain what you meant, that you had not given anything and that the consideration was in the deed.

77 A. Well, I meant that the conditions upon which I bought the property were in the deed.
Q. Well, if that deed showed that the consideration was one dollar, was that the true consideration or not?
A. No, sir; it was not.
Q. Did you then intend to testify that one dollar was the entire consideration that you had paid to Col. Holliday for this deed?
A. No, sir.
Q. What was the consideration for this deed?
A. The consideration was twelve thousand five hundred dollars and part of the thirty-five thousand dollars deferred payments.
Q. After you left the stand on behalf of the complainant have you since refreshed your recollection by an examination of this particular deed?
A. I have.
Q. And from such examination you now testify as to the consideration in that deed, do you?
A. Yes, sir.
Q. What is your wife's name?

A. Her given name?
Q. Yes, sir.
A. Orpha.
Q. What was her name before her marriage with you?
A. Orpha Beulah De Wolf.
Q. How old was she when you became acquainted with her first?
A. I think she was 17 or 18 years old when she came to Topeka; that is my recollection.
Q. Was that the time when you first became acquainted with her?
78 A. Yes, sir.
Q. The complainant has testified that your wife was reared in his family, as a member of his family, and treated as if she was his own. I wish you would state the exact position that she occupied with the complainant's family during the period from your first acquaintance with her until the time that she left his family and you married her. State fully what her duties in the household were and the exact position that she occupied.
A. She came here with his family in 1857, and they came into the hotel that stood right on this very spot that this building stands on—the old Topeka house; they moved into it and kept it as a hotel. Mrs. Kellam acted in the capacity of a table girl and a sort of a servant for the family, and helped them run the house as a hired servant would do—just had the same work that the servant girls had to do, and acted in the capacity of a servant more than anything else.
Q. Then instead of the complainant treating her as his own daughter he really made use of her services without paying her any compensation except her board, was it not?
A. He did.
Q. Has there, as far as your knowledge goes, been any remarkable degree of affection existing since that time between the complainant and your wife?
A. No, sir; quite the contrary.
Q. Have you been made aware of the complainant's feelings towards your wife and your wife's feelings towards the complainant during the time that has elapsed since your marriage with her?
A. Yes, sir.
Q. Has the complainant's treatment of your wife either during the period that she occupied this undesirable position in his household or since the time that she left his household been of any such character as to warrant you as her husband in looking
79 after or protecting the financial interests of the complainant in any respect?
A. No, sir.
Q. Has there been any particular amount of social intercourse between you and Mrs. Kellam on the one part and the complainant on the other part?
A. No, sir.
Q. Has your wife other relatives in North Platte or has she had

other relatives in North Platte other than the late wife of the complainant?

A. Yes, sir.

Q. What relatives has she had there?

A. She has had a sister there; she now has a sister there; she had two sisters living there.

Q. Have you or your wife ever gone to North Platte, Nebraska, for the purpose of visiting the complainant solely?

A. No, sir.

Q. When was the last time that you were in North Platte, Nebraska?

A. In 1879.

Q. What time in 1879?

A. In the spring of 1879.

Q. Was there any fact or circumstance that occurred at that time to impress the date of your last visit upon your mind?

A. Yes, sir.

Q. What was it?

A. We went there in the fall of 1878 to go into the hotel—to run the hotel—upon Mr. Keith's importunities to come up and take the hotel off of his hands. We packed up our good- here and sold off a good many that we did not care to carry, and went up there with the intention of taking the hotel. We got there and
80 Mr. Keith seemed disinclined to talk the matter over at all, and we did not get the hotel. We staid there through the winter and along through the fore part of the summer. He discharged Mr. Eels, who was then clerk of the hotel, and I took his place and run it the few months that I was there. Mrs. Kellam was with me until such time as I could get a house outside of the hotel. I rented a house for her to go into, and after I did that she lived in the house and I in the hotel.

Q. At whose solicitation was it that you and your wife went to North Platte in the fall of 1878?

A. At Mr. Keith's.

Q. During the time that you were in North Platte at this time, from the fall of 1878 to the spring of 1879, you say you were engaged as a clerk in the hotel which was conducted by Mr. Keith, the complainant?

A. Yes, sir.

Q. Did such duties occupy all your time?

A. They did.

Q. Was it through any fault of yours that you were not successful in obtaining the hotel at North Platte, which was the object of your visit there then?

A. It was not.

Q. Did you go there for the sole purpose of taking the hotel off Mr. Keith's hands and operating it yourself?

A. I did.

Q. Were you at any expense in making the trip to North Platte?

A. I was; yes, sir.

Q. What was the character of that expense?

A. Freighting my goods there. I hired a car by itself to put all my goods into and shipping them up there and renting the
81 house, etc., and my trip up there.

Q. You then left Topeka with the intention of changing your domicile from Topeka to North Platte, did you—moved your household goods?

A. I did; yes, sir.

Q. The complainant, in referring to the time that you and Mrs. Kellam were there at this time, in the fall of 1878 and the spring of 1879, has testified that he made you a present of three hundred dollars without being under any obligations to do so, either moral or legal, for the purpose of reimbursing you for your time and expenses in this fruitless trip. I wish you would testify fully as to what you did while at North Platte, and whether or not you received any other pay for your services as clerk of the hotel except the three hundred dollars that the complainant has testified in regard to?

(Complainant's solicitor objects to the question—what the complainant's testimony was, and to the leading nature of the question.)

A. When Mr. Eels resigned his position I took his position, which was clerk, and to run the hotel, oversee the whole running of the hotel, buying the supplies, etc., and took full charge of it. Mr. Keith was away a great deal, and when I came to go away—I think I run the house in the neighborhood of six months—when I came to go away I asked him what he was going to allow me, and he wanted to know what I wanted. I told him I thought that $50 per month would be as little as my time was worth, and he gave me a check for $300.

Q. Was that the only money that he had paid you while you were there?

A. It was.

Q. Was that the only time that he ever gave you three hundred dollars?

82 A. It was.

Q. Has there been a friendly correspondence between your family and Mr. Keith since the time that he went to Nebraska?

A. While Mrs. Keith was living Mrs. Keith and my wife corresponded—a friendly correspondence.

Q. Has there been any other, with that exception?

A. No, sir; not any.

Q. What has been the character of such communications, if any, that you have received from Mr. Keith during the past 15 or 20 years?

A. They have been as a matter of business; of a business character altogether.

Q. Has he shown by such correspondence that he placed any great amount of confidence or implicit faith in your looking after his wel-

fare, except as to the particular matter of business that he has corresponded in regard to?

Complainant objects to the question because it is leading and because it calls for conclusions of the witness which are not proper as evidence.

A. His communications have been strictly confined to business; never anything of a friendly nature; nothing of that kind; purely business matters.

Q. When was the first time that you had a personal interview with the complainant since you left North Platte, Nebraska, in 1879?

A. In the fall of 1885.

Q. What time in the fall of 1885?

A. In the latter part of November; on the 22nd of November, 1885.

Q. Where did that occur?

A. At Omaha.

83 Q. Did there anything occur at that time that has left a vivid impression upon your mind as to the particular time of this meeting? And, if so, state what it was.

A. There was. It was the anniversary of my brother-in-law's and wife's marriage. Mr. Keith was present with myself and wife and family.

Q. Who is the brother-in-law that you refer to?

A. Mr. Guy C. Barton.

Q. Who was present at this marriage anniversary of Mr. Barton and his wife?

A. There was Mr. Barton's family, my own family, Mr. Keith, Mr. and Mrs. Ballinger, of St. Joseph, and Miss Alice Clark, of North Platte. I believe that was all.

Q. Have you ever been in North Platte, Nebraska, since 1879?

A. No, sir.

Q. If you ever told the complainant that the land in controversy was worth about $20,000, when must it have been? Was it before or after your interview with him in Omaha, in November, 1885?

A. I say that I never told him that.

Q. You are very confident, are you, that you did not tell him that at the interview in Omaha in 1885?

A. Yes, sir.

Q. Why are you so confident of that fact? Did you have any conversation with him about the property at that time?

A. Yes, sir.

Q. Well, state what it was.

A. I had a conversation with him about the property and made him an offer of $40,000 for the land.

Q. State when.

A. In November, 1885. I might say, right down to the point, on the 23rd day of November. That was the Monday after the anniversary.

84 Q. Do you remember where-bouts in the city of Omaha you were when this conversation occurred?

A. Yes, sir; I do.

Q. Where were you?

A. We were in a crockery store. I don't remember just what street it was on. We were talking about the land, and there is where I made him the offer.

Q. Did you tell him that you wanted to purchase the land?

A. I did.

Q. What did he say to it?

A. He was not ready to sell.

Q. Did he ask you what you would give for it?

A. I think not.

Q. What did you say to him in making this offer?

A. I think I told him that if he was ready to sell the land I would like to become a purchaser, and that I would make this offer to him, that I would give him forty thousand dollars for the land if he was ready to sell, and he simply said that he did not want to sell; that is about the sum and substance of the offer. We also talked about Topeka and the prospects of Topeka. I told him that Topeka was bound to make a good town if we got the railroads here that we expected to get; that the Rock Island was heading this way, and in all probability, the way the talk was, the prospects were that it would go by us without stopping here and making this a point.

Q. Go by on which side?

A. On the north side; but then I told him I hardly thought they would hardly leave a town of Topeka's size out to one side and go by. I also told him to come over to Topeka and see us and look at the town; that he would be surprised at the growth of the town, and that he had a good property here, and that some day it would be worth a good deal of money. He said he had

85 no doubt but what there would be a large inland town in Kansas and that Topeka might be the point. I told him that that depended altogether on the shoot the railroads took, and if we got the railroads here we would be a good town.

Q. At the time of this conversation with Mr. Keith was it a fact that it was uncertain about the Rock Island road coming to Topeka?

A. It was quite uncertain. I know our people were very anxious about it at that time.

Q. Was there some indication that the road would leave us on the north and west?

A. Yes, sir.

Q. Was that what you referred to in your conversation with him?

A. It was.

Q. Had you ever sought to purchase this land before of Mr. Keith?

A. No, sir.

Q. Did you terminate that interview at Omaha in 1885, leav-

ing him with the knowledge that you desired to purchase that land?

A. Yes, sir.

Q. From that time to this has he ever sought any information of you as to the value of the land?

A. No, sir; he has not.

Q. Who has paid the taxes on this land since Mr. Keith has been in Nebraska?

A. I have for him.

Q. Did you continue to pay them for Mr. Barton while the land was in his name?

A. I did.

Q. Was there any arrangement or agreement between you
86 and Mr. Barton by which you were to pay them?

Objected to because it is incompetent, irrelevant, and immaterial.

A. No, sir; there was not.

Q. You simply followed out the custom of handing over the money to the county treasurer as you had been in the habit of doing for Mr. Keith, did you?

A. That is all; yes, sir.

Q. About when did you acquire any use of the land in controversy in this suit?

A. I think it was about the year 1876.

Q. Under the arrangements that you have testified to in the examination where you appeared as a witness for the complainant?

A. I think so; yes, sir.

Q. Where did the interview occur between you and the complainant at the time the arrangement was made that you testified to in regard to fencing the property and you to have the use of the land for pasturage, etc.?

A. In North Platte.

Q. Have you ever had anything to do with the land except looking after the taxes and having the use of it?

A. No, sir.

Q. When was the Topeka, Salina and Western railroad laid out through the north part of this land?

A. I think in 1882.

Q. Who were the commissioners appointed by the district court for the purpose of condemning the right of way for this road through Shawnee county?

A. The commissioners were Enoch Chase, George Lovington, and myself.

Q. When were you appointed?

A. I think that it was in June, in 1882, if I remember right.

87 Q. Was public notice published of your appointment?

A. Yes, sir.

Q. Where was it published?

A. In the Topeka papers.

Q. Was Mr. Keith made aware of the fact that you were one of the commissioners?

A. He was.
Q. How?
A. By my sending him the notice clipped from the paper. I also wrote him a letter enclosing it.
Q. Have you a copy of that publication notice?
A. I have.
Q. Will you produce it?
A. I haven't it with me; I have it at my house, but I will get it.

The notice is produced above referred to, and is hereto attached and made a part of witness's deposition in this case:

87*a* *Notice by Publication.*

Notice is hereby given that upon application in writing to the Hon. John T. Morton, judge of the district court within and for the county of Shawnee, State of Kansas, made by the Topeka, Salina and Western Railroad Company, the undersigned, Enoch Chase, Edward P. Kellam, and George W. Ludington, were by the said judge duly appointed commissioners to lay off along the line of the said company's railroad as located and proposed to be constructed by it through a portion of the said county of Shawnee a route therefor, and lands for other purposes herein named, through as much of said county as may de desired by said company, and to ascertain the quantity of land to be taken for such route and for the construction and operation of said railroad and for side tracks, depots, workshops, water stations, materials for construction except timber, a right of way over adjacent lands sufficient to enable such company to construct and repair its road and stations, and for the purpose of making proper drains, and to be so taken out of each quarter section or other lot of land through and upon which said route and lands for other purposes shall be laid out, and to appraise the value of such portion of any such quarter sections or other lot of land so taken and assess the damages thereto.

The application for said appointment and the certificate thereof, together with the oath of office of said commissioners, are filed for record in the office of register of deeds of said county. The said commissioners will commence the discharge of their duties under their said appointment on Thursday, the 10th day of August, 1882, and will meet for such purpose at 10 o'clock a. m. of said day, at the county clerk's office, in the court-house in said county, and will proceed from thence to the terminus of said proposed railroad, at the city of Topeka, in said county, and begin the work of laying off the lands for said route and for other purposes as aforesaid.

ENOCH CHASE.
ED. P. KELLAM.
GEO. W. LUDINGTON.

Topeka, Kan., July 5th, 1882.

To the introduction of which notice complainant's solicitor objects because it is incompetent, irrelevant, and immaterial and no proper foundation laid for its introduction.

Q. This is a copy of the notice that you sent to Mr. Keith, is it?

A. Yes, sir; appointment of the commissioners, etc., by the district judge of this district.

Q. What, if anything, did you receive in reply from Mr. Keith after you had sent this notice to him?

A. He wrote that he did not want the road to go through; that is about all he wrote, that he did not want the road to go through there. I do not think that his letter was more than two lines long.

88 Q. Did he instruct you to employ an attorney and resist the road's going through?

A. No, sir; he did not.

Q. Did you offer any resistance to the road's going through?

A. No, sir; I did not.

Q. Why not?

A. Why, I did not think it was any use, in the first place. I was one of the commissioners to appraise the right of way, etc., and I did not care to do it.

Q. Did you ever receive a letter from Mr. Keith or from a son-in-law of his named Neville, instructing you to resist the laying out of that road through this tract?

A. Yes, sir.

Q. (Handing witness letter.) Is that the letter that you received in regard to the road?

A. I should say it was; yes, sir.

Q. In whose handwriting is that letter, if you know?

A. I should say, from what I have seen of Mr. Neville's writing, that it is his.

The letter here referred to is here produced to the examiner and offered in evidence, and is hereto attached, marked Exhibit A, and made a part hereof.

Q. Does the road referred to in this letter refer to the Topeka, Salina and Western road; or, if not, to what road?

A. No, sir; it refers to a road on the east line, between Mr. Keith's property and Mrs. Ward's; it is a township road, I think—a wagon road.

Q. It does not refer to a railroad at all?

A. No, sir; not at all.

Q. At the time this letter was received by you how long had the Topeka, Salina and Western road been laid out through this land?

89 A. Some four years, I should say.

Q. Is this the only letter that you have ever received from Mr. Keith or from Mr. Neville containing any instructions about any road?

A. I think not. I think I received one from Mr. Neville in regard to a road.

Q. When was that?

A. It was in regard to this very road.

Q. When was it?

A. About the same time—about some time in April or May of 1886.

Q. Have you that letter?

A. I do not know that I have; no, sir.

Q. Don't you know whether you have or not?

A. I don't think I have, Mr. Smith.

Q. You have produced all the letters that you have from Mr. Neville of from Mr. Keith in regard to this land, have you not?

A. Yes, sir; all of them.

Q. Have you searched to see if you could find any other letters?

A. I have.

Q. What did Mr. Neville say in this letter that you have not got in regard to the road?

A. Mr. Keith wanted I should employ an attorney to stop this road going through.

Q. To stop this county road?

A. Yes, sir; that was the substance of it.

Q. That was the only instruction that you ever received from Mr. Keith, to employ an attorney to stop a road going through there, is it?

A. It is.

90 Q. And that road had reference to a county road or township road and not to a railroad?

A. Yes, sir.

Q. Then if the complainant or Mr. Neville have testified as to directing you to employ an attorney and resist the laying out of a railroad through this land they are in error and have mistaken the county road for the railroad?

Objected to because it is incompetent, irrelevant, and immaterial.

A. They have, most assuredly.

Q. When, if you know, was the condemnation money paid into the county treasury for the laying out of this railroad through the land?

A. I could not state when it was paid into the county treasury.

Q. When did you first have anything to do in regard to that particular money?

A. When Mr. Keith wanted I should collect it and apply it on the payment of taxes.

Q. When was that?

A. I could have gotten the exact date of that, but I have not.

Q. Well, about when—what year?

A. My impression is that it was in 1884 or 1885. I know it laid in the county treasurer's office for two years, at least.

Q. And you paid no attention to it for the reason that you had never been instructed by Mr. Keith to draw the money?

A. No, sir.

Q. Is that the reason?

A. That is the reason; yes, sir.

Q. Were you finally instructed by Mr. Keith to draw this

91 money?

A. I was.

Q. How?

A. By a letter from him instructing me to draw the money and apply it on the taxes; and he sent the draft for the balance of the taxes to add to it and complete the payment.

Q. Have you examined the receipt for this condemnation money that was produced by the county clerk of Shawnee county, Kansas, who was called as a witness for the complainant some two or three weeks ago?

A. I looked at it casually at that time; yes, sir.

Q. Are you acquainted with Mr. Keith's signature?

A. I am.

Q. Whose signature is attached to this receipt?

A. Mr. Keith's.

Q. In his own handwriting?

A. Yes, sir; in his own handwriting.

Q. What is your recollection about the rest of the signature to the receipt?

A. That is mine.

Q. Do you remember how the signature reads?

A. I think I do.

Q. What is your recollection about it?

A. I believe it reads, "M. C. Keith, by E. P. Kellam, agent."

Q. Do you remember the reason, if any, that caused you to add "by E. P. Kellam, agent," to Mr. Keith's genuine signature to this receipt?

A. The county treasurer requested me to sign it after M. C. Keith.

Q. For what reason?

92 A. So he would know who drew the money.

Q. You then signed "by E. P. Kellam, agent," for that reason, did you?

A. I did; yes, sir.

Q. And were you Mr. Keith's agent for that particular purpose in drawing that money?

A. I was.

Q. You had been specially instructed by him to do that thing, had you?

A. I had; yes, sir.

Q. What was done with this money after you drew it?

A. I paid the taxes with it.

Q. Why did you pay the taxes with it?

A. Mr. Keith requested me to.

Q. Was the amount sufficient to pay all the taxes?

A. No, sir.

Q. Where did you obtain the money to pay the balance, if you did?

A. He sent a draft for the balance.

Q. What, if anything, did you do in pursuance of the instructions contained in the letter of May 3rd, which is marked Exhibit A of defendants' testimony, in regard to putting in a claim for damages for this county road?

A. I put in a claim for it.

Q. Before whom?

A. Before Judge Harvey, I think. No, it was in Judge Harvey's office that I wrote up the claim and took it onto the ground when the viewers were out there and handed it to them.

Q. Was that the claim for damages that was produced among the records of the county clerk's office of Shawnee county when the complainant called the clerk as a witness in his behalf?

A. I don't know; there has been two attempts to lay roads
93 across that land; one was across it; which one it was I cannot say; there was one to run north and south and one to run east and west.

Q. Why have you made claims for damages for various roads that have been attempted to be laid out through this land?

A. Mr. Keith requested me to.

Q. Did you ever make any claim for damages for these roads except upon the request of Mr. Keith?

A. I never did.

Q. Have you ever appeared before the board of equalization to endeavor to procure a decrease in the assessed value of this property?

A. I think I did once.

Q. Why?

A. I wrote Mr. Keith that I thought the assessment was high and he requested me to see if I could not get it reduced.

Q. What, if anything, have you ever done in relation to this land, except upon instructions direct from Mr. Keith, outside of paying the taxes and taking charge of it for pasturage purposes, as you have testified to?

A. Not anything.

Q. Do you recollect the time that the property lying immediately adjacent to this land in controversy on the west was subdivided or platted?

A. I don't recollect the time exactly.

Q. Well, do you remember about what year it was?

A. I would say it was 1883 or 1884.

Q. What was the name of that property?

A. Potwin place.

Q. Did you procure a diagram of it or a plat?

A. I did.

Q. From whom?

94 A. Mr. Jenkins.

Q. When?

A. About the time it was platted.

Q. For what purpose?

A. To send to Mr. Keith.

Q. Did you send it to Mr. Keith?

A. I did.

Q. Why did you send it to him?

A. Mr. Potwin was very urgent that he should lay out with him at that time in order to make a street on the line between them—a

wide avenue—and he wanted I should use my influence with Mr. Keith to get him to do it. Several times he talked to me about it before I did anything about it, and finally I consented to write to him and send him this plat to show him how Mr. Potwin was going to lay out and how his land would lay out with it.

Q. Did you hear from Mr. Keith in regard to it?

A. I did not.

Q. How did you send it?

A. By mail.

Q. Enclosed in a letter and envelope?

A. Yes, sir.

Q. Postage prepaid?

A. Yes, sir.

Q. Was the letter directed to him at North Platte?

A. Yes, sir.

Q. Did you ever apply to Mr. Keith to have this particular tract platted?

A. I did.

Q. When was that?

A. That was in November, I think, 1885.

Q. Before or after your interview with him at Omaha?

A. That was at the same time.

95 Q. In November, 1885, was Mr. Keith advised of the fact that buildings were being erected in Potwin place?

A. He was.

Q. Was he advised of the fact that this tract of land in controvesy was desirable land for the purpose of subdividing into lots and blocks?

Objected to by complainant's solicitor because it is leading.

A. He was.

Q. What did you tell Mr. Keith in regard to the Potwin place at this interview?

A. I told him if he would plat his ground that it would bring him more money than any other way he could dispose of it; that Potwin had platted his, and they were building some nice houses upon it, and it would make an attractive part of the town.

Q. Was that before or after the time that you had offered him $40,000 for this tract?

A. I could not say.

Q. Was it at the same interview?

A. It might have been and it might not. We had several talks during the time that we were there in regard to the land.

Q. How long were you and Mr. Keith together in Omaha?

A. We were together—he was in Omaha and we saw each other at different times—from Sunday until Tuesday. I think he left for North Platte Tuesday.

Q. Do you know Mr. Eels?

A. I do.

Q. Was he ever in Topeka?

A. He was.

Q. When?

A. I think it was in the fore part of 1886; in the winter time.

96 Q. Who is Mr. Eels?

A. He is an uncle of Mrs. Kellam's.

Q. What connection, if any, has he had or has he now, with Mr. Keith?

A. He was clerk in the hotel when I went up there in 1878, and I think he is an insurance agent now in North Platte.

Q. What is his name?

A. Lester.

Q. Is his wife a distant relative of the former Mrs. Keith?

A. No, sir; I think not.

Q. Where does he live now?

A. In North Platte.

Q. How long was he here?

A. A week or ten days, I think.

Q. What was he doing here?

A. He was visiting my family.

Q. Did you go with him to look at the land?

A. Yes, sir.

Q. Did you go over the town generally with him?

A. Yes, sir; we rode all over town. I showed him everything of interest here—through the State house and the Santa Fé offices.

Q. Did you go out upon this particular piece of land that is in controversy in this suit?

A. Yes, sir.

Q. With him?

A. Yes, sir.

Q. For what purpose?

A. To show it to him.

Q. Why did you desire to show it to him?

A. He asked me as he went out where Morrell's land was,

97 and we went out to it.

Q. Who did he refer to when he named Morrell?

A. Mr. Keith.

Q. The complainant in this suit?

A. Yes, sir.

Q. Did you go all over it?

A. We drove on the south part of it. We did not go; it was quite a cold day, and we did not drive down onto it.

Q. What conversation about the land occurred between you and he there?

Objected to because it is incompetent, irrelevant, and immaterial.

A. I told him that I had offered Mr. Keith $40,000 for the property. He said he thought it was a pretty big price for the piece of land, the way it looked.

Q. What else did he say about the land, if anything?

A. I don't think he did.

Q. Did he say anything about Mr. Keith?

Objected to as incompetent, irrelevant, and immaterial, and that the answer calls for that which is merely hearsay.

A. I think not; no, sir.
Q. Where did Mr. Eels go -fter he left Topeka, if you know?
A. He went right home.
Q. Where is home?
A. In North Platte.
Q. The same place that Mr. Keith resides in?
A. Yes, sir.
Q. Prior to the year 1886 had you ever sent any offers to Mr. Keith to purchase this land yourself?
A. I had not.
Q. Have you at any time ever been authorized by Mr.
98 Keith to sell this land?
A. No, sir; I have not.
Q. Have you ever been authorized by Mr. Keith to procure a purchaser for this land?
A. No, sir.
Q. Have you ever offered yourself as an agent to the public to sell this land?
A. I have not.
Q. Are you acquainted with Mr. Keith's business ability?
A. I am, somewhat.
Q. What is it?
A. He is a very good business man; what I would call a very sharp business man.

The last question is objected to by complainant, and it is moved to strike answer out.

Q. Have you ever written to Mr. Keith, stating to him the value of this land?
A. No, sir; I have not.
Q. Has he ever asked you the value of it at any personal interviews you have had with him in the last six or eight years?
A. He might have done so; yes, sir.
Q. Well, has he, to your recollection?
A. Well, I could not say. I should rather think he had not, though, since 1879.
Q. Have you seen him at any time since 1879 except the time you met him in Omaha?
A. No, sir.
(Witness is handed a letter and asked:) You may examine that letter and state in whose handwriting it is.
A. It is in Morrell C. Keith's handwriting.
Q. Did you receive it from him?
A. I did.
99 Q. Was there an enclosure with it?
A. There was.
Q. Examine the next paper and state if that was enclosed with the other letter.

A. It was.

Q. Was this letter enclosed when you received the letter in the handwriting of Mr. Keith?

A. It was.

The letter and enclosure above referred to and identified by witness is here offered in evidence, marked respectively B and C, and made a part hereof.

Q. Did you write to the complainant a letter under date of June 30th, 1886?

A. I did.

Q. How did you happen to do that?

A. At the solicitation of Col. Holliday.

Q. Did you receive a reply to that letter?

A. I did.

(Witness is here shown a letter and asked:) In whose handwriting is that letter?

A. Morrell C. Keith's.

Q. Is that the reply to your letter of July 30th?

A. Yes, sir.

The letter referred to is here offered in evidence, marked Exhibit B of defendant's testimony, and is made a part hereof.

Q. What did you do with this letter, after receiving it?

A. I showed it to Mr. Holliday.

Q. Is Col. Holliday the person who is referred to as "that man?"

A. He is.

Q. What did you do after receiving this letter of the 7th of July? Did you write to him again?

100 A. I did; yes, sir.

Q. Under what date?

A. July 13th.

Q. After the letter of July 13th did you then receive another letter from the complainant?

A. I did.

(Letter is here shown witness and witness asked:) Is that the letter?

A. Yes, sir.

Q. What is the date?

A. July 20th.

Q. In whose handwriting is that letter?

A. M. C. Keith's.

Q. Is there any signature to it?

A. There is not.

Q. After the receipt of this letter of July 20th did you exhibit it to Col. Holliday?

A. I did.

The letter referred to is here offered in evidence, marked Exhibit E, and made part of this deposition.

Q. After the receipt of complainant's letter of July 20th did you reply to that?

A. I did.

Q. Have you a copy of that letter?

A. I think I have.

Q. Have you a copy of the whole of that letter?

A. No, sir.

Q. How does it occur that you did not retain a copy of that letter—the whole of that letter?

A. Well, a portion of that letter was written by Col. Holliday—the offer of the latter—and it must have got mislaid.

Q. Did you retain a letter-press copy of that letter?

101 A. No, sir.

Q. What do you mean by that, "It must have got mislaid," then?

A. Well, I can't find it—could not find it.

Q. Can't find what?

A. The whole of the letter.

Q. I am talking about your letter of the 27th of July to Mr. Keith—if you have seen that letter since you sent it to him?

A. I think there is a portion of the letter of the 27th of July that we have not got.

Q. Will you examine the letters or copies of the letters furnished by the complainant upon the application of the defendants, which are now lying before you, and state whether your letter of the 27th of July or a copy of it is among the letters or copies submitted by the complainant in pursuance of thea pplication of said defendants?

A. No, sir.

Q. Did you retain a copy of the concluding portion of your letter of the 27th of July to the complainant?

A. I did.

Q. Was the opening part of the letter containing the offers written in the handwriting of Col. Holliday?

A. It was.

Q. What portion of the letter of the 27th did you retain a copy of?

A. The latter part of the letter.

Q. What was the latter part of the letter? What did it say?

A. It was as follows: "Shall require abstract of title, etc.; if you accept either of the above offers I will see to making out all necessary papers, etc. Let me hear from you. Yours truly, E. P. Kellam."

102 Q. Did you receive from the complainant a reply to this letter of the 27th?

A. I did.

Q. You may examine this paper and state if that is the letter that you received from the complainant in reply to yours of the 27th.

A. I should say it was.

Q. Is that in the complainant's handwriting?

A. Morrell C. Keith's; yes, sir.

The letter last identified by witness is here offered in evidence, marked Exhibit F of defendants' testimony, and made a part hereof.

Q. After the receipt of complainant's letter of July 29th did you inform Col. Holliday of the contents or show it to him?

A. I did.

Q. When did you communicate to the complainant again after the receipt of the letter of July 29th?

A. I think some time in the forepart of August—August 4th.

Q. Did you write two letters to the complainant under date of August 4th?

A. I did.

Q. Did you have any reply from the complainant to your letters of August 4th?

A. I think I did.

Q. When did you again write to the complainant?

A. August 11th.

Q. In your letter of August 11th was there any enclosure; if so, what was it?

A. A deed.

Q. What kind of a deed, and for what?

A. A warranty deed for the land in controversy.

103 Q. Made out to whom?

A. Made out to C. K. Holliday, or Cyrus K. Holliday.

Q. Was this deed ready for the signature and execution of Mr. Keith?

A. It was.

Q. When did you again hear from the complainant after your letter enclosing this deed?

A. On the 18th of August.

(Witness is here handed a letter and asked:) Is that the letter that you received on the 18th of August from the complainant, and is it in his handwriting?

A. That is the letter, and that is Morrell C. Keith's handwriting.

The letter above referred to is here offered in evidence, marked Exhibit G of defendants' testimony, and made a part hereof.

Q. What was the next communication, if any, that you had from the complainant?

A. I think a telegram from him.

Q. Did you receive the deed from the complainant finally?

A. I did.

Q. Signed and acknowledged by the complainant?

A. Yes, sir; signed and acknowledged by the complainant.

Q. What date did you receive it, if you remember?

A. I think it was on the 21st of August.

Q. Did you acknowledge the receipt of the deed; and, if so, under what date?

A. I did, August 21st.

Q. Under letter of that date?

A. Yes, sir; under letter of that date.

Q. What was the next communication that you had from the complainant?

A. I wrote him August 30th.

104 Q. Did you send a telegram to him the same day?

A. Yes, sir.

Q. What was the telegram that you sent him?

A. It was as follows: "I mail you draft to-day for twenty-five thousand."

Q. What draft did that refer to?

A. It referred to the draft to make the first payment on the land.

Q. From whom did you receive this draft?

A. C. K. Holliday.

Q. Did you write to the complainant the same day?

A. I did.

Q. What was the date?

A. August 30th, 1886.

Q. What was enclosed in your letter of August 30th, 1886?

A. A New York draft for $25,000.

Q. What did you say about the mortgage and notes?

A. That they would follow in a few days.

Q. After sending your letter of August 30th did you see the complainant personally before writing him again; and, if so, when was it?

A. I saw him in Omaha in September, on the 7th or 8th of September, in 1886.

Q. At the time you saw him in Omaha had the $25,000 been sent to him?

A. It had.

Q. Had he received it, do you know?

A. He had.

Q. How do you know he had received it?

A. He told me he had.

Q. Where did he tell you that?

105 A. In Omaha.

Q. How did you happen to go to Omaha and meet the complainant instead of to North Platte?

A. My wife was in Omaha, and I went there to meet her and some other friends from New York, and also to see Mr.—I knew Mr. Keith was to be there—to see him in regard to changing the date of the payments of the notes, of the deferred payments.

Q. What change did you desire to make or have made?

A. I desired to have the notes read from two to three years instead of one to two years.

Q. Where did you see him in Omaha?

A. I saw him at the Paxton hotel.

Q. By appointment?

A. Well, no; not by appointment really.

Q. Did you know that he was stopping there?

A. I knew that was the hotel that he stopped at when he was in Omaha.

Q. You went to see him?

A. Yes, sir.

Q. At any time during that interview did you ask him to extend the payment of the whole sixty thousand dollars?

A. No, sir.

Q. Then if the complainant has testified that you did apply to him for an extension of the whole sixty thousand dollars he is mistaken, is he not?

A. He is most assuredly. I would not ask him that when he had already received $25,000.

Q. What did you ask him?

A. I asked him if it would be just as convenient to him to have these notes made payable in two and three years instead of one and two years, and he thought about it a little while and then said he did not know as he could negotiate them as well, but he
106 would see, and we then talked upon other matters and he told me that he had had letters from several parties here in town in regard to the land, and that he would not have sold at that time but that he wanted to use the money in an Omaha deal that he had there on hand.

Q. Did he tell you what this Omaha deal was?

A. It was some property near Omaha, near the city.

Q. Did he tell you that he was making purchases of property in Omaha or near there, or that he was contemplating doing so?

A. That he was contemplating doing it; yes, sir. It was a large place near town that he was contemplating buying and he wanted to turn the whole thing in, and he thought he could not negotiate the notes perhaps as well if they were running two and three years instead of one and two years.

Q. Then you did not apply to him there for a change upon the terms of sale, except an extension upon the deferred payments?

A. That was all.

Q. Was that one of your objects in going to Omaha?

A. It was.

The further taking of this testimony is here adjourned until Friday, November 4th, 1887, at the hour of 3.30 o'clock p. m., at the same place.

LESTER S. WILSON, *Examiner.*

Parties met pursuant to adjournment.

Present as before, and also E. S. Quinton, representing the complainant, and the direct examination of Mr. KELLAM was resumed as follows:

Q. In your letter of the 27th of July to the complainant, of which you say you only retained the concluding paragraph, or rather referring to your letter of the 27th of July, you stated that part of that letter was in Col. Holliday's handwriting. Are you correct about that?

A. No, sir; I am not.

Q. In whose handwriting was the whole letter?

107 A. Mine.

Q. What did you mean, then, by referring to part of the letter being in Col. Holliday's handwriting?

A. Col. Holliday handed me the memorandum of the offer that was sent in the letter of July 27th.

Q. Did you insert the phraseology of his memorandum in the letter?

A. I did.

Q. What was that; what did it comprise?

A. It was an offer for the property of ten thousand dollars down and the balance in semi-annual payments of ten thousand dollars each, at six per cent. interest; also another offer, a second offer, of twenty thousand dollars down and twenty thousand dollars in one and two years, deferred payments at six per cent. interest.

Q. Have you ever seen the letter of July 27th that you sent the complainant since the time that you sent it?

A. No, sir; I have not.

Q. What else, if anything, was contained in this letter of July 27th to the complainant besides the terms suggested by Col. Holliday and that portion of your letter that is set forth in your answer, being the concluding paragraph of the letter?

A. I added, after making the offer, these words, that "I expect to have an interest in the land."

Q. What pa-t of the letter was that phrase used in?

A. I think it was right after stating the offer of Col. Holliday's.

Q. Why did you insert that in the letter?

Objected to because it is incompetent, irrelevant, and immaterial.

A. Mr. Keith knew that I always wanted to have an interest in the land or to purchase it, and he had written me in his
108 former letters in this correspondence that—in his letter of July 7th—he states in one of his letters previous to that that he would rather I would have it—something of that kind—and he knew that I would like to become a purchaser of it if the opportunity ever occurred by which I could obtain it.

Counsel for complainant objects to so much of the answer as refers to other letters as incompetent, irrelevant, and immaterial.

Q. At the time you wrote this letter of July 27th had any arrangement been completed between you and Col. Holliday by which you were to acquire an interest in this property?

A. Not fully; no, sir; we had talked about the matter, and I had intimated to him that I would like to become an interested party in the purchase if I could.

Q. During the whole time of the negotiation for the purchase of this property did you at any time seek to conceal from the complainant that you were endeavoring to acquire an interest in the property or that you had acquired an interest in this purchase?

A. Not in the slightest degree; no, sir.

Q. After your return from Omaha, in which you say you had an

interview with Mr. Keith, did you receive any word or letter or telegram from him after that?

A. Yes, sir.

Q. You may examine that paper and state what it is.

A. It is a telegram from him that I received.

The telegram above referred to is here offered in evidence and is marked Exhibit H and made a part hereof.

Q. On the receipt of this telegram what did you do? Did you comply with the request contained in the telegram?

A. I sent him the notes and mortgages; yes, sir.

Q. Did you advise him of the fact that you had sent them; and, if so, how?

109 A. I sent them on the 20th, in a letter transmitting them, and told him the reasons why I had not sent them before, because the title was not perfect; we had not got the release of a certain mortgage that we had to record from Mr. Bushman, of Michigan.

Q. Well, at the time you sent these notes and mortgages to the complainant had you acquired the release from Bushman?

A. No, sir; we had not.

Q. Why did you send them to him, then?

A. He was very anxious to get them, so that he could negotiate them.

Q. How do you know that?

A. Because he told me that he wanted to negotiate them when I was in Omaha—negotiate the notes and mortgates in the Omaha deal that he had in some property there, and he was anxious to get them.

Q. What do you refer to when yo use this language in your letter of September 20th to the complainant: "But to accommodate you in your Omaha deal, will send to-day."

A. I meant just as I said; that I wanted him to get them so that he could use them in his Omaha deal that he referred to in September 8th, when I was there; that is the time that he told me he would not sell the property, only that he wanted to use the money in an investment in Omaha.

Q. When, if ever, did you receive a communication from the complainant after you had transmitted the notes and mortgages to him?

A. I don't think I have since then.

Q. Your letter of the 20th, then, closed all written or verbal communications between you and the complainant in regard to this transaction, did it?

A. Yes, sir.

110 Q. Do you remember of having written any other letters touching the subject-matter of the controversy in this suit—that is, the real estate—other than those referred to already in your testimony?

A. No, sir.

Q. To the complainant?

A. No, sir.

Q. During any of the time that negotiations were pending between the complainant and your codefendant, Col. Holliday, in regard to this land, did you seek in any way to conceal from the complainant the value of the land or mislead him as to the value of it?

A. No, sir; by no means.

Q. Did the complainant ever make any inquiry of you as to the value of this land or as to the growth of the city of Topeka or the growth of additions adjacent to this land during the time that these negotiations were pending for the purchase of the property by Col. Holliday?

A. He did not.

Q. Did he make such inquiries at any time during the year 1886?

A. No, sir.

Q. Did you ever, when parties came to you with reference to this land, withhold information from them or refuse to give them Mr. Keith's address?

A. No, sir; never.

Q. Did you ever state to any such parties that you had the land for sale or had charge of it as agent for the complainant for the purpose of receiving bids or selling the land?

A. No, sir.

Q. Do you know a Mr. Ferguson and did you hear him tes-
111 tify here on behalf of the complainant?

A. I did. I know him some. I am not very well acquainted with him.

Q. Did you hear his testimony here?

A. I did.

Q. You were present here in the court-room when it was given, were you?

A. I was.

Q. When do you remember of first ever having met Mr. Ferguson or ever seeing him?

A. I do not know. I could not say when was the first time I ever saw him. I think I recognized him as the man who used to keep an implement store up on the avenue here. The first time I saw him, I think in 1883, I think he was dealing in agricultural implements up there.

Q. Do you remember of his coming to see you in the month of July, 1886, in reference to this land?

A. I don't remember of his coming there. He might have done so—not as being any particular time.

Q. Do you recollect of any persons approaching you or offering to purchase this property, or making offers for the purchase of this property to you, during the months of June or July, 1886?

A. No, sir; I do not.

Q. How soon after July was it that parties did approach you to purchase the property—seek to purchase the property?

It might have been the latter part of August or first of Sep-
r—along there.
Were there various parties that came to see you about the
rty during the month of August and September, seeking to
hase it?

A. None came into my office to see me; they would meet
112 me out around and ask me about it.

Q. Who do you remember of having met you and asking you about this property, talking about purchasing it, during August and September, 1886?

A. I think that Mr. Strickler was one that met me on the street and asked me about it.

Q. Do you remember of any one else speaking to you about the property?

A. Mr. Ferguson might have done so.

Q. Do you remember of the occasion that Mr. Archer and Mr. Gillette and yourself were upon this property?

A. Yes, sir.

Q. When was that—what date?

A. That was August 6th, 1886.

Q. Why do you fix the date so positively?

A. Well, we were on a trip out there across the land to appraise some property lying north of it.

Q. Well, how do you know that you appraised the property lying north of it on August 6th, 1886?

A. I should think it was about that date. I do not know that I am really positive of it. It was somewhere near August 6th, 1886.

Q. Did you make any report or return of your appraisement?

A. No, sir; we went to the office and signed the appraisement, the report.

Q. What property was this that you went to appraise?

A. It was some of Dan. Horne's property, I think.

Q. Don't you know whether it was or not?

A. I understood that he owned it at the time. It was being appraised for the benefit of his heirs, as I understood. There was nothing said to me or to any of us about who owned the property.

113 Q. How close to this Keith tract was the Horne tract?

A. It joins it on the north.

Q. What is the character of the Horne tract as compared with the northern part of the Keith tract?

A. It is smooth bottom land, most of it.

Q. Well, is it like the northern part of the Keith tract?

A. No, sir; the northern part of the Keith tract is timbered and bluffy, and the Horne tract runs down on the bottom to the river.

Q. What price did you appraise the Horne tract at?

Objected to because it is incompetent, irrelevant, and immaterial. The preceding question is withdrawn.

Q. Do you remember of Mr. Watson making a proposition for the purchase of this property?

A. I do.
Q. At that time who were the owners of the property? g be-
A. Col. Holliday and myself. y, in
Q. About what time, according to your recollection, was it the
Mr. Watson proposed to purchase the property? lue
A. In the latter part of September, 1886.
Q. Do you remember of Mr. Ferguson's testimony in regard to an alleged conversation that he said occurred between you and him about your uncle being in the case?
A. No, sir; I do not.
Q. Do you remember of his testifying anything about that fact?
A. I remember of his testifying about it; yes, sir.
Q. You remember of his testifying to that fact, do you?
A. I do; yes, sir.
Q. Well, at about the time that he states conversation to
114 have occurred was Col. Holliday in the East?
A. I don't know as I remember what time he made that statement.
Q. Did Col. Holliday go East at any time during the month of August?
A. He did.
Q. When did he go?
A. He went on the 9th of August.
Q. How long did he remain?
A. He remained until about the 30th or 31st.
Q. Who were the owners of this property during the period that Col. Holliday was in the East?
A. Myself and Col. Holliday.
The preceding question and answer is objected to by complainant, and it is moved to strike it out, because it is a question of law who was the owner and a conclusion of the witness.

Q. Did Mr. Ferguson ever make you any offer for the purchase of this property?
A. No, sir.
Q. Did you consider that Mr. Gillette made you any offer for the purchase of this property?

Objected to because it is incompetent, irrelevant, and immaterial.
The preceding question withdrawn.

Q. What is your recollection of the conversation that occurred between you and Mr. Gillette at the time you were on the land and Mr. Archer was present?
A. Well, as near as I can recollect, when we were riding over the land he spoke of it as being a fine piece of land, and that he could get so and so for it. I don't know how much now; I do not
115 recollect; it might have been a thousand dollars an acre for a portion of it.
Q. It might have been even more?
A. It might have been more; yes, sir.
Q. Did it leave any impression upon your mind whatever?

No; nothing worth remembering. I never thought of it after- at all.

Did you ask him as to his views about the value of the land?

No, sir; I did not.

Was there ever at any time any understanding or agreement arrangement, either directly or indirectly, between you and Col. Holliday by which you were to procure from Mr. Keith for Col. Holliday the title to this property in consideration of your acquiring an interest in it?

A. No, sir.

Q. Did any element of that kind enter into your dealings with Col. Holliday in any respect?

A. Not in the slightest degree; no, sir. Everything that was done between Col. Holliday and myself was open and above-board in every respect. We never had one moment's private talk in regard to the trade between us at all.

Q. Was that the character of your transactions with the complainant, also?

A. It was; yes, sir.

Q. Did you ever do anything or have any communication with the complainant by which the complainant could have been led to underestimate the value of his property?

A. No, sir; never.

Q. Were you acquainted with the values of land in the vicinity of Topeka during the latter part of June and July, 1886?

A. Yes, sir; I think I was.

116 Q. What did you consider a fair value for the purpose of purchasing that tract of land of the character of this land in controversy in the months of June or July, 1886, to be?

A. I considered the price paid for it, $750 an acre, the value, a fair valuation of the land at that time. I can tell you the reason why if you want me to; what we contemplated doing, what we were intending to do to bring it up into where it could be sold, and where there would be any money in it.

Q. I do not care for that. I want your ideas as to the value of it.

A. I considered the price paid for it, $750 an acre, a fair value.

Q. Have you ever acted as the agent of Col. Holliday—as an agent for him at all?

A. No, sir.

Q. Has there been a notice posted upon his private door to the effect that you were his agent?

A. No, sir.

Q. What has that notice been?

A. There is a notice. It has been there quite awhile. I think it reads about this way: "Parties will please pay to E. P. Kellam or Judge Clark any monies during my absence;" something to that effect.

Q. And in pursuance of that notice parties would leave money with you or with Judge Clark or any person in the office?

A. Yes, sir; just whichever person happened to be in took it.

Q. Did you receive any money from Mr. Keith for placing improvements upon that land?

A. Yes, sir; for fencing the south line.

Q. Did you receive anything from him for replacing the fence and repairing the east and west fences?

117 A. No, sir.

Q. If you have anywhere stated that you received no money from Mr. Keith for improvements, what improvements did you refer to?

A. To the fencing of the south line—a part of the south line. It was not all fenced—the whole line; only up to where another fence joined it.

Q. Do you mean you received no money from him in regard to the south line?

A. I mean that I did receive money from him for fencing a portion of the south line.

Q. Then the improvements you referred to as having received no money from him for were the north line and the repairs on the east and west lines?

A. Yes, sir.

Q. Did you so understand the question to be when I interrogated you?

A. No, sir.

Q. What did you understand, then?

A. Just now when you interrogated me—it seems as though we ought to get at that pretty straight.

Q. I was about to ask you if you so understood the inquiry to be when I asked you on your cross-examination as to whether or not you ever received any money from Mr. Keith for these improvements. Did you understand the improvements referred to to be all the fence upon the land, or did you understand the word improvements to refer only to the north fence and the repairs on the east and west fences?

A. Only to the improvements on the east and west fences.

Q. Was the north fence included in these improvements?

A. No, sir.

Q. Did Mr. Keith ever refund you anything for building

118 the north fence?

A. No, sir.

Q. Did he ever pay you anything for building the north fence?

A. No, sir.

Q. Then all the money that you ever got from him for building a fence was for building the south fence, was it not?

A. That was all; yes, sir.

Q. When was Mr. Keith's deed delivered to Col. Holliday—before or after you met Mr. Keith in Omaha, on the 6th or 7th or 8th of September, 1886?

A. It was before.

Q. If you have stated anywhere in your testimony, then, that at that time—that is, on September —, at the time you were in Omaha—

his deed had not been delivered to Col. Holliday, you are en in that, are you?

Yes, sir.

Cross-examination—questions by Mr. BERGEN:

Q. Is your memory of dates good?

A. Well, not very; no, sir.

Q. Have you during this examination had before you and in your hands a memorandum containing dates among other things written?

A. No, sir; I have not. This is one I just this moment laid down here. I took it out of my pocket. No, sir; I have not had anything before me.

Q. Yesterday in your examination-in-chief you stated, did you not, and read to the examiner a copy of a portion of what you say was your letter of July 27th to M. C. Keith? Was there not other writing upon the same sheet of paper from which you read that part of the copy?

119 A. What was the date of that letter?

Q. July 27th, 1886.

A. Yes, sir; there was.

Q. Have you that paper now in your possession?

A. I have not; no, sir.

Defendants' solicitor here hands solicitor for complainant a paper for the purpose of his use if he desires, being the paper referred to by the witness.

Q. Is this the paper to which you referred and from which you read yesterday?

A. It is.

Q. Is that in your handwriting?

A. A portion of it; yes, sir.

Q. What portion of it is in your handwriting?

A. The latter part of it—the concluding part.

Q. In whose handwriting is the remainder?

A. Mr. Holliday's.

Q. Will you permit this to go to the examiner as a full copy—as the entire paper from which you were reading?

A. I will.

The defendants' counsel states that he has no objection to the use of the paper referred to in evidence.

Q. When did you write so much of this as is in your handwriting?

A. July 27th, 1886.

The paper above referred to is here produced to the examiner and offerred in evidence, and is marked Exhibit I and made a part hereof.

Q. When did you first pay any taxes for the complainant, M. C. Keith, upon this tract of land?

A. I think it must have been as far back as 1869.

120 Q. When did you build or cause to be built for h[illegible]g be-
fence on the south line of said tract of land? [illegible]y, in

A. I think in 1876. [illegible] the

Q. At that time was there a sort of fence on the east and wes[illegible]lue north lines of this land?

A. There was a portion of a fence on the east and on the west, part of the way down on both lines, and a sort of an old brush fence on the north line.

Q. Now, for the fence on the south line you contracted for the labor and material of that fence as an agent of Mr. Keith, did you not?

A. I think I did for that purpose; yes, sir.

Q. And you directed, as his agent, where the fence should be made, did you not?

A. I did.

Q. And, he having given you the money, you, as his agent, paid for it, did you not?

A. Yes, sir.

Q. From that time have you not had the use, care, and control of those premises and received the rents therefrom until September, 1886?

A. I have.

Q. Had M. C. Keith from 1876 until the close of that year any other agent in or near Topeka looking after this property for him?

A. Not that I know of.

Q. Had the complainant been in Shawnee county at any time within the last fifteen years?

A. I think he has been here within fourteen years. I think that was about the last time he was here—about fourteen years ago.

121 Q. Did you in the year 1877 inform Mr. Keith of the amount of taxes upon the land?

A. I don't remember whether I did or not?

Q. You say in your examination-in-chief that you did no acts concerning this land except as specially requested by Mr. Keith, did you not?

A. Yes, sir.

Q. And you say that he sent you the tax money and requested you to pay the taxes?

A. Yes, sir.

Q. And you paid them?

A. Yes, sir.

Q. How did he learn what the amount of the taxes was?

A. I think I sent him the amount at his request.

Q. Would he each year write to you and request you to send him the amount of his taxes?

A. Not each year he didn't—not every year—but he or some one of his men up there would do so.

Q. Every year?

A. I could not say that they did every year; no, sir.

ould you say that they did say half the years; that before ote to him concerning the amount of his taxes that he or ent of his at North Platte would write to you and ask you it?

I will tell you——

Q. No; I asked you if you could say that they did say for half the years that before you wrote to them concerning the amount of his taxes that he or some agent of his at North Platte would write to you and ask you about it.

A. No; it might not have been half of the years; it is a good many years since 1877.

122 Q. Now, in the year 1877 do you know that before you informed him of the amount of the taxes that he or any of his agents wrote to you and asked the amount?

A. Do I know?

Q. Yes, sir.

A. I do not; no, sir.

Q. Did you inform him of the amount of his taxes in 1878?

A. I could not say.

Q. Did you pay them for him in 1878?

A. I expect that I did. I don't know that he had any one else here to pay his taxes for him.

Q. Is it not your belief that you paid them every year for him?

A. Well, I don't know but I did; I could not say that I did; I would rather think I did pay them every year.

Q. Could you say in 1879 that he or any of his agents wrote to you asking you to ascertain the amount of the taxes upon that property?

A. In 1879 I was in North Platte that winter about tax-paying time, I think, and I don't remember about it.

Q. Do you know how it was in the year 1880, whether he or any one wrote to you inquiring the amount of the taxes before you informed him?

A. Well, I could not say; I could not say in what year.

Q. Nor you could not say that half the time they wrote to you before you informed them of the amount of the taxes?

A. No, sir; I could not.

Q. Even from the year 1877?

A. No, sir.

Q. Do you remember any specific year or any one time when they wrote to you asking you to ascertain the amount of the taxes before you informed them of the amount?

123 A. Yes, sir; it was, I think, in the 70's somewhere Mr. Barton wrote to me that Mr. Keith wanted me to find out what his taxes were and to pay them, and if they became due—that is, if they were due and run over the time and the penalty would attach, if he had not sent the money at that time—to pay them myself and he would reimburse me; something of that kind.

Q. What year was that?

A. It was somewhere in the 70's, I think; I could not tell.

Q. It was before the year 1876, wasn't it?

A. It might be; I rather think it was 1877.

Q. And since then do you remember of any letter inquiring be- amount of taxes? ay, in

A. No, sir; I don't know as I do. n the

Q. Is it not the best of your belief that each year you info alue him of the amount of his taxes?

A. No, sir; it is not.

Q. Except the year 1879?

A. No; I think not.

Q. You say in your examination-in-chief that you mailed to Mr. Keith a notification of the commissioners to condemn and appraise the right of way for the Topeka, Salina and Western railroad, do you?

A. Yes, sir.

Q. Had Mr. Keith requested you to send that to him?

A. No, sir.

Q. Why did you send him that?

A. Because I thought it would be of interest to him.

Q. Were the notices of condemnation in that proceeding served upon you as the agent for Mr. Keith?

A. No, sir; I think not; I am not certain about that.

Q. Are you sure that you did not receive and acknowl-
124 edge service of the notice in that matter as agent for Mr. Keith?

A. I could not say whether I did or not.

Q. Do you know how Mr. Keith became aware that any money had been deposited in the county treasury for him for the right of way of the Topeka, Salina and Western railroad through his land?

A. I presume I wrote him what the commissioners had allowed—the facts in the case.

Q. And that the money had been deposited for him in the county treasury?

A. Yes, sir.

Q. Had he requested you to attend to that matter?

A. He had not.

Q. The money remained there a good while after it was paid, did it not?

A. Yes, sir.

Q. And was not the reason it remained there the fact that Mr. Keith desired to prevent the railroad from running on his land unless he got a depot on his land, and did not take up the money until he was convinced that he could not prevent the laying out of the road through his land?

A. No, sir.

Q. You received that money from the county treasurer, did you not?

A. Yes, sir.

Q. You received it as the agent of Mr. Keith, did you not?

A. Yes, sir.

Q. And used it as his agent in the payment of taxes upon this land?

A. I did.

Q. Do you say that Mr. Keith was not dissatisfied with the road going through his land?

125 A. He did not like it; no, sir.

Q. You signed the receipt for the money to the county treasurer as Mr. Keith's agent, did you not?

A. I did.

Q. You say in your examination-in-chief that you appeared before the board of equalization to object to the assessment of this land in behalf of Mr. Keith?

A. Yes, sir.

Q. And did so at his request?

A. Yes, sir.

Q. How did he know that it had been valued too highly or assessed at more than he thought it ought to be assessed at?

A. I think I wrote him that the assessed value on the land was pretty high, and I would try and get it reduced somewhat.

Q. Had he written to you requesting you to examine into the assessment?

A. No, sir; he had not.

Q. You did it in his interest?

A. As a friend of his; yes, sir; in his interest.

Q. Then you appeared before the board to get it reduced?

A. I did; yes, sir.

Q. In your examination-in-chief you mention two applications to the board of county commissioners to lay out a county road or county roads through this land. In which direction was the first one sought to be laid out?

A. East and west.

Q. What was that road called?

A. I think it was called the Wood road. I think that is the road.

Q. About when was that?

A. I think it was in 1880 or 1881; that is my recollection

126 about it.

Q. Was the notice of the laying out of that road served upon you as agent of Mr. Keith?

A. I think it was. I am not certain.

Q. Did you accept the notice as his agent?

A. Yes, sir.

Q. You informed him of the service of the notice, did you?

A. I informed him that they were trying to lay out a road across the land; yes, sir.

Q. He had not written to you about the road before you wrote to him, had he?

A. No, sir.

Q. You then appeared before the viewers, and as his agent claimed damages for the laying out of the road if it should be laid out on that land, didn't you?

A. I did; yes, sir.

Q. In what direction was the other road sought to be laid out?

A. North and south on the east line.

Q. When was that?

A. That might have been in 1883 or 1884.

Q. Was not the notice of the application to lay out that road served upon you as agent for Mr. Keith?

A. I believe it was.

Q. Did you not accept the notice as his agent?

A. I took the notice and attended to the business.

Q. Did you not also as his agent make a claim for damages if the road should be laid out through the land?

A. Yes, sir; upon instructions from him.

Q. Before the road was laid out or any petition for the laying out of the road had been filed had he instructed you to
127 inform him about that road?

A. No; he did not know anything about it.

Q. Until you informed him?

A. Yes, sir; not until I informed him.

Q. In 1884, when Potwin place was platted, you say you mailed Mr. Keith a copy of the plat?

A. I think Potwin place was platted before 1884.

Q. Well, then, was it in 1884 that you say you mailed him a copy of the plat?

A. It was in 1882 it was platted—Potwin place was platted in 1882. About that time I mailed him a copy of the plat; yes, sir.

Q. Had he specially requested you to mail him a copy of the plat?

A. No, sir.

Q. Have you said twice in your examination that Mr. Keith had not inquired of you the value of this land at any time in the year 1886?

A. I might have done so; I don't remember.

Q. In that I suppose you forgot the letter of May 3rd, 1886, submitted by you in your cross-examination, did you not?

A. I must have forgotten it if I have testified in that way.

Q. Does not that letter contain the question—will you please read to the examiner the whole of that letter?

A. Yes, sir. It is as follows:

"NORTH PLATTE, NEBRASKA, *May 3rd*, 1886.

DEAR KELLAM: I don't want a road there, but, if it must be, put in claim for damages; get all you can. What can the land be sold for now?

Yours truly,

M. C. KEITH.
N."

Q. On the 30th of June, 1886, Mr. Holliday submitted to you an offer for this land, did he not, to be sent to Mr. Keith?

A. He did.

Q. Did you write at any time to Mr. Keith during the
128 month of May, 1886?

A. I could not say whether I did or not.

Q. Did you write to him at any time before the 30th of June, 1886, during the month of June?

A. I don't remember.

Q. Didn't you write to him in one or the other of those months that you thought you could get him forty thousand dollars for the land?

A. I don't think I did; no, sir.

Q. Did you at any time before the letter in which you transmitted the form of deed to Mr. Keith for him to sign let him know that C. K. Holliday was the man who desired to purchase this land?

A. I think not.

Q. When you transmitted that deed to him the bargain was definitely made, was it not, between you and Col. Holliday that you were to have an interest in the land?

A. I think it was.

Q. It had been definitely arranged before you transmitted that deed that you should have a half interest in the land?

A. Yes, sir; I think so.

Q. Did Col. Holliday know where Mr. Keith lived?

A. Yes, sir.

Q. Did he know when he first made you the offer?

A. I think that he did. I don't know that he knew the town that he lived in. He knew that he lived in Nebraska.

Q. He could very readily have inquired of you, could he not, where Mr. Keith lived if he had wanted to communicate with him?

A. Yes, sir.

Q. Your offices adjoin one another?

A. They do.

Q. What has been your position and occupation for the last three years?

129 A. Book-keeper and cashier of the gas company.

Q. Who is president of the gas company?

A. C. K. Holliday.

Q. One of the defendants in this case?

A. Yes, sir.

Q. Is he the principal stockholder in the company?

A. I believe he is; yes, sir.

Q. Owning a majority of the stock?

A. Yes, sir.

Q. And his office communicates with yours, does it not, by a door between the two?

A. Yes, sir.

Q. He has a great deal of business, has he not?

A. Yes, sir; he is generally full of business.

Q. He is absent very much, is he not, from Topeka on business?

A. Quite a good deal; yes, sir.

Q. During those times you received money due to him upon land contracts and for rents and other things, did you not?

A. I did.

Q. Do you assist in the keeping of his individual books?

A. No, sir; I do not.

Q. Do you make any entries of cash received in his books?

A. No, sir.

Q. Where do you keep a memorandum of such things as you do receive?

A. I fold each individual slip of paper in an envelope and mark it Col. Holliday and lay it away until he returns, just the transaction itself.

The further taking of this testimony is here adjourned until Saturday, November 5th, at 9 o'clock a. m., at the same place.

LESTER S. WILSON, *Examiner.*

130 Parties met pursuant to adjournment.

Present as before, and the cross-examination of Mr. E. P. KELLAM was resumed as follows:

By Mr. E. S. QUINTON:

Q. When did you first have a conversation with Mr. Holliday, the defendant, in regard to the purchase of this land?

A. I think it was in the latter part of June.

Q. How many conversations do you remember of having with Mr. Holliday in regard to this land, Mr. Kellam?

A. I could not say how many.

Q. About how many?

A. We must have had several; I could not say how many.

Q. Did you have half a dozen?

A. We might; yes, sir.

Q. Did you have a dozen?

A. Well, we were talking about the land several times, day after day; I would not say how many times.

Q. Do you remember what the conversation was that you had with him, the first conversation about this land, Mr. Kellam?

A. He first spoke to me about the land; wanted to know what it could be bought for, etc.

Q. Is that all the conversation that you had with him at that time?

A. That was the principal part of it.

Q. Give us, if you please, all the conversation that you remember of having had with him at the first interview.

A. I could not do that.

Q. Is that all you remember of?

A. That was the principal part of it; what the land could be bought for, and if it could be bought at all, whether he would sell it.

Q. Is that all you remember of the first conversation that
131 you had with him?

A. Pretty much all; yes, sir.

Q. You say "pretty much all." What else was there?

A. That was the principal talk there was about it, as regards whether it could be purchased and what would be the price on it.

Q. Do you remember of anything else that was said at that conversation?

A. No, sir.

Q. When did you have the next conversation with him, Mr. Kellam?

A. We had conversations in regard to the land at that time until June 30th, up to the time that the negotiations commenced.

Q. I asked you when you had the next conversation with him after this first one that you say you had in the latter part of June, if you remember?

A. We probably had conversations every day after that.

Q. Every day about it?

A. Yes, sir.

Q. Did these conversations continue up to and until the time that you purchased the land and received the deeds for it?

A. No, sir; they did not.

Q. Do you remember in what conversation it was that he first spoke to you about taking an interest in this land?

A. It was some time between the latter part of July——

Q. Had the price finally agreed upon then been submitted to Mr. Keith for the purchase of this land?

A. I think it had.

Q. Had you said anything to Mr. Holliday about having an interest in this land prior to his speaking to you about it?

A. No, sir.

132 Q. You are sure of that, are you?

A. Quite sure of that; yes, sir.

Q. What was it that Col. Holliday said to you when he asked you if you did not want an interest in this land?

A. He said he thought it would be a pretty big load to carry—something of that kind.

Q. Do you remember distinctly, Mr. Kellam, and have you remembered distinctly ever since the time Col. Holliday spoke to you about having an interest in this land of the fact that he did speak to you first about it, and that it was prior to submitting the agreed price for the land to Mr. Keith?

A. I don't remember whether he first spoke to me about it or I to him about taking an interest in the land.

Q. Did you not just testify that you were very sure that Col. Holliday spoke to you about it first, stating that it was a pretty big load for him to carry?

A. Yes, sir; I might have testified to that.

Q. Didn't you say you was very sure of it?

A. I think I did; yes sir.

Q. Do you remember, then, and have you remembered ever since that time that the Colonel spoke to you about it, of the fact of his asking you to take an interest in this land, that it was a big load for him to carry?

A. We had so much conversation about my taking an interest that I can hardly say. I had told him that I would like to have an interest, and we had conversations about the matter.

Q. If, Mr. Kellam, you had been solicitous to have an interest in this tract of land and had importuned Col. Holliday to allow you to have that interest and requested it several times prior to the time of his asking you to take an interest in this land, that it
133 was a pretty big load for him to carry, you would certainly remember it, would you not, if you had done such a thing?

A. Why, I should think I would; yes, sir.

Q. Then, as a matter of fact, you did not do such a thing as that, did you?

A. Did not ask him?

Q. You were not solicitous of having an interest in this land, and requested several times——

A. I was solicitous of having an interest in this land.

Q. And requested it several times prior to his telling you that it was a big load for him to carry, and that he wanted you to take an interest?

A. I might have done so.

Q. Don't you remember, Mr. Kellam, anything definite about this transaction that took place?

A. I remember this, that somewhere in the latter part of July we first talked about my taking an interest in the land, but I was not in a financial condition to really take the interest without the help of Col. Holliday, and I told him that if he would take care of the first payment—that was after, though—after we got the—after we received Mr. Keith's offer of the 29th of July.

Q. I am not asking you anything about when it was. I am asking you if you do not remember anything definite about what occurred in this transaction, Mr. Kellam.

A. I think I do; yes, sir.

Q. You think so?

A. Yes, sir.

Q. Don't you state in your sworn answer, Mr. Kellam, that you many times solicited and requested Col. Holliday to allow you to take an interest in this land?

A. I think not.

134 Q. You stated a few moments ago, did you not, that you did request Col. Holliday to allow you to take an interest in this tract of land?

A. I spoke to him about it; yes, sir.

Q. Do you remember any of the conversation that took place between you and Col. Holliday upon the third day—you said you had daily conversations with him about this tract of land—upon the third day or third conversation that you had with him in regard to it?

A. I do not.

Q. Nothing about it?

A. I do not.

Q. Do you remember anything that occurred upon the 4th day or upon the 4th conversation?

A. No, sir.

A. Upon the next conversation you had with him do you remember anything that you said then or that he said to you?

A. I do not; no, sir.

Q. About how many conversations did you have with him prior to sending this deed to Mr. Keith?

A. I could not say.

Q. About how long was it before you sent the first offer to Mr. Keith that you had your conversation with Col. Holliday in regard to the purchase of the land—the first conversation?

A. It was some time in June; perhaps from the—between the 20th and 30th of June, as near as I can remember.

Q. Do you remember what time it was that you sent your first offer to Mr. Keith?

A. June 30th.

Q. Cannot you tell now or can't you possibly remember whether it was a week or two weeks or three weeks prior to that time
135 in which you had your first conversation with Col. Holliday about this land?

A. It might not have been more than a day or two, since I think of it, from the time that he made the offer.

Q. Do you remember what day it was that Col. Holliday made the offer to you; that it was a pretty big load; that he could not carry it, and wanted you to take an interest?

A. No, sir; I do not.

Q. Do you remember whether Col. Holliday made that offer to you prior to the time that you acquainted him with the fact that you could not do anything at present or pay any money, as you have stated here before; that he would have to carry it, anyway?

A. I did not make such a remark as that.

Q. Did you not state a few moments ago that he would have to make the first payment?

A. I thought that we could get the money on time—the first payment. I would like to take an interest in it if he would let me.

Q. He would have to make the first payment, as you have stated a moment ago?

A. Yes, sir. He would have to borrow the money.

Q. Do you remember whether or not, when you told him this, the time was before the time that he said it was a pretty big load; that he could not carry it?

A. No; I don't remember about that.

Q. Is it not a fact, Mr. Kellam, that you are not very positive about any of the dates or times in which you had any of these conversations with Mr. Holliday or about the time that any of these transactions occurred that you have testified to?

A. I can answer this, Mr. Quinton——

Q. Please answer my question, Mr. Kellam.

A. No, sir; I don't think it is a fact.

136 —. You stated, I believe, Mr. Kellam, that prior to the time Col. Holliday spoke to you that it was a pretty big load and that he would like to have you take an interest you had spoken to him about having an interest in this land, did you not?

A. I don't remember whether I had spoken to him or not before he told me that.

Q. Do you remember, Mr. Kellam, whether you spoke to Col. Holliday first or whether Col. Holliday spoke to you first about having an interest in this land?

A. I think Col. Holliday spoke to me first about it.

Q. Is "I think" a mere form of expression or is it a fact that you don't remember?

A. Well, I am quite sure that he did.

Q. Did you not state, in your sworn answer, Mr. Kellam, that you requested many times and solicited Col. Holliday to allow you to have an interest in this land?

A. I think not, Mr. Quinton; I did not.

Q. Did you not state in cross-examination a few minutes ago that you spoke to Col. Holliday first about it—just a few minutes ago—and told him at that time that you would like to have an interest in the land?

A. I might have done so.

Q. Well, which is correct, Mr. Kellam—the statement that you now make or the statement that you made before as to your having an interest in this land?

A. I am quite sure that Col. Holliday spoke to me first about having an interest in the land.

Q. I believe you stated in your prior examination here that the first time you notified Mr. Keith of your interest in this land was at Omaha—when you met him in Omaha. I believe that is
137 correct. I will ask you now if that is a fact.

A. That is the first time that I notified him that I had an interest; yes, sir.

Q. Well, what do you mean by that to state—that it is the first time that you notified him that you had an interest, or that you was getting an interest, or that you was buying an interest in this sale that he made to Col. Holliday at that time?

A. I mean by that that it was the first time I told him I had acquired an interest in the land.

Q. Did you not state in your examination here yesterday, Mr. Kellam, that you notified him that you were to have an interest in that tract of land when you were selling it there to Col. Holliday?

A. I think not.

Q. If you did state, then, Mr. K-llam, that you notified him you were to have an interest in this tract of land in selling it to Col. Holliday, you were mistaken, were you?

A. I testified in my——

—. Just answer my question; the question was, If you did state that you notified Mr. Keith that you were to have an interest in this tract of land in selling it to Col. Holliday, you were mistaken, were you?

A. No, sir.

Q. What did you mean, then, Mr. Kellam, by stating that you first notified him that you had an interest in the land in Omaha?

A. I meant just what I said. I told Mr. Keith in Omaha that I had an interest in the land, but I notified him during the transaction of the sale that I was to have an interest in the land. "To have" and "have" I considered different things altogether.

Q. Do you remember at what time it was—the date of it now—
that Col. Holliday first spoke to you about taking an interest
138 in this land?

A. I could not give the exact date.

Q. Can you give it within a month?

A. I think I can.

Q. Can you give it within a week?

A. Yes, sir.

Q. When was it?

A. It was some time from the latter part of July to the 3rd of August; somewhere along there.

Q. You remember that distinctly, do you?

A. Yes, sir.

Q. Did you remember it at the time you filed your answer in this case?

A. I think so.

Q. Why did you state, then, in your answer that you requested of Col. Holliday several times to have an interest in that land before he asked you to?

A. I don't think I stated that.

Q. If you did state so, which statement is correct—the one you made in your answer or the one you make now?

A. The statement I make now, I think, is correct.

Q. You do not remember any more distinctly about it now than you would at the time you filed that answer, would you?

A. I don't know that I do.

Redirect examination—questions by Mr. SMITH:

Q. How many times have you ever been on the witness stand, Mr. Kellam?

A. This is the first time.

Q. You are not an experienced witness, then?

A. No, sir.

Q. When you refer in your cross-examination to the 20th
139 of June as having a conversation about the purchase of this
property with Col. Holliday, do you mean about your purchase of the property or about his purchase of the property?

A. About his purchase of it.

Q. Had you notified the complainant prior to your meeting him in Omaha in September that you were to have an interest or had you notified him that you expected to have an interest in the property?

A. I notified him that I expected to have an interest in the property.

Q. Then at this time that you notified him of that fact had there any completed arrangement been entered into between you and Col. Holliday about your acquiring an interest?

A. No, sir; there had not.

Q. In the memorandum which you have produced upon cross-examination, from which you prepared your letter of the 27th of July to the complainant, whose handwriting is that part of the memorandum in which the propositions are made?

A. C. K. Holliday's.

Q. Is everything on the first page of this memorandum in his handwriting?

A. It is.

Q. In whose handwriting is the matter on the back of this?

A. Mine.

Q. Does this memorandum purport to be a full copy of the letter or simply a memorandum or part of it?

A. It is a memorandum—a portion of it.

Q. When did you pay to Col. Holliday your portion of the cash payment?

A. The 30th of March, 1887.

Q. How do you know it was the 30th of March?

140 A. My check for that amount is dated on that date.

Q. Have you got the check?

A. I have.

Q. Will you produce it?

A. Yes, sir.

Q. Is this the check that you refer to?

A. It is.

Q. In whose handwriting is the endorsement on the back—the written portion of it?

A. Col. Holliday's.

The check here identified by the witness is here offered in evidence and produced before the examiner with the request that it be attached to the witness's testimony, which is accordingly done, marked Exhibit K.

Q. Who first suggested that you should take an interest in this land? Did you suggest that to Col. Holliday or did he approach you first about it?

A. I think he suggested it to me.

Q. Then if you have testified *before during* the time that you have spent upon the witness stand that you first approached Col. Holliday for an interest you are mistaken when you testified to that fact, are you?

Q. I am; yes, sir.

Q. Have you any distinct recollection about it one way or the other?

A. I am quite sure that he first mentioned the matter to me.

Q. Was there anything to impress it upon your mind?

A. Yes, sir.

Q. What was it?

A. He desired some one to take an interest in it with him on account of its being a big load for him to carry, and he naturally asked me about it—if I would not.

141 Q. Was that before or after you sent his offer to Mr. Keith?
A. That was after.

Recross-examination—questions by Mr. QUINTON:

Q. Did you not, Mr. Kellam, prior to that time express to Mr. Holliday your desire to have an interest or to own an interest in that tract of land?

A. Prior to what time?

Q. Prior to the time you just spoke of here that Col. Holliday spoke to you about its being a big load.

A. No, sir.

Q. You never expressed yourself to him in any manner that you desired or would like to have or expressed a wish of that kind, or that you would like to have an interest in that land?

A. I don't think I did; no, sir.

Q. If Col. Holliday says you did in his answer in this case, which is mistaken, you or the Colonel?

A. I don't know what Col. Holliday says in his answer.

Q. That is not what I asked you. The question was, If Col. Holliday says that you did in his answer in this case, which is mistaken, you or the Colonel?

A. The Colonel must be mistaken.

Q. As a matter of fact, Mr. Kellam, did you not have that desire before the offer was sent—the first offer?

A. I have always desired to buy the land; would like to own the land like anybody else would; that was a good piece of land; anybody would like to have it if the opportunity occurred that they could purchase it. I had offered Mr. Keith awhile before—that is, a year before that—a price for the land that would indicate that I would like to have it.

Q. You say you don't remember the conversation that you had with Col. Holliday—daily conversations—about the purchase of this tract of land. Now, might not you have expressed yourself
142 to Col. Holliday as desiring to have an interest in that land in all these conversations?

A. No, sir.

Q. Are you sure of that?

A. Why, he was buying the land; I was not.

Q. That is not the answer to my question. The question was, You say you don't remember the conversation that you had with Col. Holliday—daily conversations—about the purchase of this land. Now, might not you have expressed yourself to Col. Holliday as desiring to have an interest in that land in all these conversations?

A. I had not the means to purchase the land—to acquire an interest in the land.

Q. Mr. Kellam, you have referred to a memorandum here in the cross-examination, I have noticed, several times. When was that memorandum that you have referred to made—at the time that the dates or the matters on there were transacted?

A. It was.

Q. How did you come to make a memorandum at that time?
A. Col. Holliday made the memorandum.
Q. The memorandum that you have taken from your pocket and referred to on cross-examination here?
A. No, sir.
Q. Who did make the memorandum?
A. Col. Holliday made the memorandum that you refer to, as I understand it.
Q. I refer, Mr. Kellam, to a memorandum that you have taken from your pocket in answer to questions asked you on cross-examination.
A. No, sir; I made the memorandum that is in my pocket.
Q. When did you make that memorandum?
143 A. A few days ago.
Q. Have you read the deposition of Mr. Keith in this case?
A. A portion of it.
Q. Did anybody assist you or were with you when you made that memorandum?
A. No, sir.
Q. Did you make that memorandum since or prior to your reading the deposition of Mr. Keith?
A. Since.
Q. You state in your redirect examination here that previous to your meeting Mr. Keith in Omaha no definite plan had been made for you to have an interest in that tract of land, did you not?

Objected to for the reason that the counsel is mistaken as to the statement of the witness.

A. I don't think I did.

E. P. KELLAM.

144 JOEL HUNTOON, a witness on behalf of the defendants, being by me first carefully examined, cautioned, and solemnly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

Direct examination—questions by Mr. SMITH:

Q. What is your name, age, place of residence, and occupation?
A. Joel Huntoon; residence, Topeka; occupation, civil engineer; I will be 64 years old soon.
Q. How long have you resided in the city of Topeka?
A. 31 years since I first came here.
Q. How long have you been following the occupation of civil engineer and surveyor?
A. I commenced surveying and engineering before I came here—35 years, I suppose.
Q. Have you been a large property-holder of real estate in the vicinity of Topeka during your residence here?
A. I own 80 acres of land adjoining Topeka. I pre-empted 80 acres of land adjoining Topeka, and I own some besides.

Q. Were you acquainted in the months of June and July, 1886, with the market values of real estate in the vicinity of Topeka?

A. Yes, sir; my information—shall I explain how I get it—how it came?

Q. I am not particular about that.

A. Then I suppose that is sufficient.

Q. Do you know the piece of land, being the east half of the southeast quarter of section 25, township 11, range 15, and part of the east half of the northeast quarter of the same section, commencing at the southeast corner of said northeast quarter, thence north 13 rods, thence at right angles west one quarter of a
145 mile, thence at right angles south 13 rods, thence at right angles east to the place of beginning, situated in Shawnee county, Kansas, being what is commonly known as the Keith tract, comprising 86 and ½ acres?

A. Yes, sir; I have known it for a long time. I surveyed the land for Bushman before he sold it, as far back as 1858, I think.

Q. Are you acquainted with the character of this land—the way it lies?

A. Yes, sir; I know it very well.

Q. From your knowledge of this tract of land and general knowledge that you have of the values of property in Topeka and vicinity, what would you state to be the market value of it during the months of June and July, 1886?

A. Well, my judgment was called to the land at that time, and I made an off statement that I thought it was worth about a thousand dollars an acre. Whether a man would give that for it, whether parties would give that for it or not, was a question, but if — had bought it for any less than a thousand dollars an acre I would have considered that I was getting a good bargain.

Q. Was there a rapid increase in values after the month of July, 1886, in Topeka and vicinity?

A. Yes, sir; within two weeks of that time property had advanced a good deal, and did right along until the end of the fall.

146 J. W. FARNSWORTH, a witness on behalf of the defendants, being by me first carefully examined, cautioned, and solemnly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

Direct examination—questions by Mr. SMITH:

Q. What is your name, age, place of residence, and occupation?

A. John W. Farnsworth; my age is 58 years last January; I live in Topeka, Kansas; I am in the mercantile business.

Q. How long have you resided in Topeka?

A. 31 years last May, I think.

Q. Are you acquainted with the complainant, Morrell C. Keith?

A. I used to know Mr. Keith here in an early day. I have not seen him for many years.

Q. Are you an owner of real estate in the vicinity of Topeka?

A. Yes, sir.

Q. Were you acquainted with the market value of property in the vicinity of Topeka in the months of June and July, 1886?

A. Yes, sir; I had given some attention and been somewhat interested in the price of property in and out of the city of Topeka.

Q. Do you know what property in the vicinity of Topeka would sell for, or the market value of it at this time, in June and July, 1886?

A. Yes, sir; I have what I think is some knowledge. I am always observing those things, and am always interested in property, both in and out of the city.

Q. Are you acquainted with the tract of land known as the east half of the southeast quarter of section 25, 11, 15, and six
147 and one-half acres immediately north of it, being a part of the east half of the northeast quarter of the same section, commonly known as the Keith tract?

A. I know the Keith tract; it is right west of Mrs. Ward's place, but I don't know the numbers of the sections.

Q. From your knowledge of the values of real estate in the vicinity of Topeka what, in your opinion, would be a fair market value for this piece of property in the entirety, in the months of June and July, 1886?

A. Well, its value per acre, taking the entire body of it?

Q. Either way; yes, sir.

A. Well, I don't think it would sell for over seven or eight hundred dollars an acre at that time.

Q. Would you consider that a fair market value for the property at that time?

A. Yes, sir; I would.

Cross-examination—questions by Mr. QUINTON:

Q. You state, Mr. Farnsworth, that you are engaged in the mercantile business in the city of Topeka?

A. Yes, sir.

Q. Is it not a fact that you have been actively engaged in that business for several years past?

A. Yes, sir.

Q. You have quite a large business, have you not—the crockery business?

A. I don't consider it very large. It is moderately large.

Q. It keeps you pretty busy—it occupies most of your time attending to that business, don't it?

A. No, sir; I don't give particular attention to the business in the store. I buy the goods and mark them, and don't intend to do much more.

148 Q. Does not that employ the most of your time?

A. No, sir; I don't like to do more work than I am obliged to in the store. I have other outside business to look after.

Q. I will ask you, Mr. Farnsworth, if you were actively engaged in buying or selling property in the city of Topeka in June or July, 1886?

A. I don't know that I was making any sales at that time I had property that was being being offered for sale.

Q. I asked you if you were actively engaged in buying and selling property?

A. No, sir, I was not buying and selling much property at that time.

Q. Did you buy or sell any property at that time, Mr. Farnsworth?

A. Not in June or July, that I recollect of. I don't recollect. I might have sold some lots or something out in Parkdale, but I don't recollect of selling any.

Q. Do you know of any tract of land or any body of land around Topeka being sold at that time, Mr. Farnsworth, of your own knowledge?

A. There has been land changing hands here a great deal, but I don't know whether I could tell just the months that the transactions took place in or anything except what I was personally connected with.

Q. Please answer the question. The question was, Do you know of any tract of land or any body of land around Topeka being sold at that time?

A. I am not able to state the dates of any transactions in real estate.

Q. Were you asked or sought to make purchases or to sell any tracts of land of that kind during those months, Mr. Farns-
149 worth, that you remember of?

A. I don't recollect any just at this time.

Q. Is it not a fact, Mr. Farnsworth, that additions to the city of Topeka along that time were very desirable property?

A. Not so desirable at that time as they were after.

Q. That is not what I asked you. I asked you if it was not a fact that additions to the city of Topeka at that time were desirable property?

A. Why, yes; I think they were desirable property.

Q. Can you state, Mr. Farnsworth, whether or not your attention was called to this tract of land at that time—in June and July, 1886?

A. I don't recollect that it was.

Q. When was your attention first called to this tract of land that you have put the price upon it that you have in this testimony?

A. Well, I estimated it——

Q. When was your attention first called to it, I asked you.

A. I think some time in—I don't thing I heard the sale of it until the early part of winter.

Q. You did not know then, as a matter of fact, along in June and July, what land was being sold and bought for around the city of Topeka, did you?

A. When I heard of any land being sold of course I took note of it as being interested and wanted to know the value of it.

Q. The only way, then, that you knoew of sales or purchases of

property being made at that time was your incidentally seeing them in the paper or hearing of them?

A. Yes, sir; by hearing of it and seeing the transfers in the papers.

Q. I will ask you again when you first had your attention
150 called to the value of this land that you have put upon it the price you have in this testimony—how long ago was it?

A. I could not say any definite time. I think it was the early part of winter.

Q. It was a long time after this sale actually occurred, was it not?

A. Well, I don't know when the sale occurred only by hearsay.

Q. Well, from what you heard was it not a long time after the sale had occurred that your attention was called to this tract of land?

A. Yes, sir; it must have been at least three or four months.

Q. Then when you put the price on this tract of land that you have, Mr. Farnsworth, you had no particular sales in view by which to judge of the price of property, had you?

A. Well, there had been some sales earlier, I think.

Q. That is not what I asked you. The question was, When you put the price on this tract of land that you have you had no particular sales in view by which to judge of the price of property, had you?

A. Well, I think there was the sale of Mr. Kellam down in the bottom and Mr. Thomas's, and some of those transactions took place previous to this.

Q. That is not what I asked you. I asked you if you had any particular sales or purchases in mind by which you judges of the value of this land at the time you put this price on it that you have.

A. Well, yes; these tracts that had been sold.

Q. Do you know what Mr. Kellam's place sold for?

A. I think Mr. Kellam told me it sold for $100 an acre, if
151 I recollect right. I am not positive in regard to that price. I think he claimed—that he told me he was getting all it was worth at the time of the sale. I was talking with him about the sale afterwards. It was George Kellam's place.

Q. You are speaking of George Kellam's farm, are you not?

A. Yes, sir; that is east of town.

Q. Do you know how long before it was that George Kellam sold his farm for one hundred dollars an acre?

A. I think he sold his quite early in the spring; I don't know just the dates.

Q. It is located, is it not, about three and a half miles east of the city?

A. The Kellam tract?

Q. Yes; George Kellam's farm.

A. No, sir; I think not.

Q. By road?

A. I think it is from the city limits the way the road goes, I think

it is only about a mile and a half, if I count the sections right, from the city limits.

Q. Outside of the city limits?

A. Yes, sir.

Q. Is it not a fact that George Kellam's farm is bottom land?

A. Yes, sir; it is what we call second bottom land.

Q. And on the bank of the river?

A. I think it runs to the river; I am not positive about that.

Q. You don't pretend to say, do you, Mr. Farnsworth, that there is any comparison in value between George Kellam's farm and the Keith tract of land as an addition to the city of Topeka?

152 A. Well, it is that and the Thomas farm.

Q. I am not asking you about the Thomas farm. I ask you if you pretend to say that there is any comparison in value between George Kellam's farm and the Keith tract of land as an addition to the city of Topeka?

A. Why, there is a comparison in value, but there is a difference in value; I do not think it is equally valuable at all as an addition.

Q. Is it not a fact, Mr. Farnsworth, that there were houses, and a great many of them, and a valuable addition, and built up, adjoining on the west the Keith tract of land?

A. Yes, sir; there was the Potwin place.

Q. Is not the city built up in residences on the south side of the Keith tract?

A. Yes, sir.

Q. Adjoining it on both sides?

A. I think they have sold up to it—yes, sir; I think so.

Q. And is it not a fact that it is built up adjoining the east side of the south part of the said Keith tract of land?

A. Yes, sir; there is a notch in there of the Ward tract.

Q. I will ask you if there was any part of the city—any residences considered city property—within a mile of the George P. Kellam farm?

A. At the time that that was sold?

Q. Yes, sir.

A. No, sir; I think not at the time that that was sold.

Q. You do not pretend to say, do you, Mr. Farnsworth, that from what knowledge you have shown to have of the value of property in Topeka in June and July, 1886, that the amount you have stated in your testimony is all that the Keith tract of land would have sold for at that time?

153 A. I think it is.

Q. Did you know what lots in Potwin place were selling for immediately adjoining the Keith tract of land at that time?

A. I understood that they were selling that in acre lots for $1,500 where it was laid off, shade trees set out, and parks, etc.

Q. Did you have any conversation with any one during the months of June and July, 1886, about the Keith tract of land, as to what it would sell for?

A. I don't think I did; I don't recollect any.

Q. Did you hear anybody else talk about what it would sell for at that time?

A. I don't recollect hearing any one state.

Q. I believe you stated that you were not actively engaged in buying or selling any property at that time yourself?

A. Well, I had property that I was offering for sale.

Q. That is not the answer to my question. I wish you would please notice and answer the questions I ask you. The question was if you were actively engaged yourself in buying and selling any property at that time.

A. I did not have any transactions that I remember at that time.

Q. Then this Kellam tract of land and the Thomas tract of land which you have mentioned are the only pieces of property that you remember of being sold previous to this time in June and July, 1886, of that year?

A. I can't say that the Thomas tract just what time that did sell, but my recollection is that Mr. Kellam's was in the spring, but it was later when the Thomas tract was sold.

Q. As a matter of fact, then, Mr. Farnsworth, this Kellam farm and the Thomas tract of land were the only pieces of land that you knew of being sold at that time, was it not?

154 A. There were other pieces being sold, but I don't recollect them just at this time. There were occasional transactions.

Redirect examination—questions by Mr. SMITH:

Q. You own considerable property, and did in June and July, 1886, in the vicinity of Topeka, did you not?

A. Yes, sir.

Q. Lying adjacent to it?

A. Yes, sir; I had some property lying even with the city limits that was not platted at that time.

Q. You have been looking after the interests of that property in connection with your mercantile business?

A. Yes, sir.

Recross examination—questions by Mr. QUINTON:

Q. The property to which you refer as owning within the city limits and not being platted lies to the east of the railroads, does it not?

A. Yes, sir.

Q. And beyond the Shunguanungua creek?

A. Yes, sir.

Q. And in the bottom?

A. Yes, sir.

J. W. FARNSWORTH.

155 J. T. CLARK, a witness on behalf of the defendants, being by me first carefully examined, cautioned, and solemnly

sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

Direct examination—questions by Mr. SMITH:

Q. What is your name, age, place of residence, and occupation?

A. J. T. Clark; my age is 73; my present occupation is in charge of the gas works in Topeka, Kansas.

Q. Are you acquainted with the complainant and the defendants in this suit?

A. I know the defendants, but not the complainant.

Q. What gas company are you connected with?

A. With the Excelsior Coke and Gas Company, of Topeka.

Q. The same company which Col. Holliday is president of?

A. Yes, sir.

Q. How long have you lived in Topeka?

A. I came to Topeka, I think, in the fall of 1868.

Q. Whereabouts in Topeka do you now live?

A. In what is called Potwin place—Potwin's subdivision.

Q. When did you acquire title to the property in Potwin place?

A. Well, it is now just about two years since I made the purchase of that.

Q. That would be in November, 1885?

A. In October, I think it was—that is, the month of October, 1885. I am not definite as to that date, but it was about that time.

Q. Were you acquainted with the market values of property lying adjacent to Topeka in the months of June and July, 1886?

156 A. Well, as a matter of fact I think my knowledge of the value of real estate was limited. My business did not call on me to know. Of course I heard in a general way, but only that.

Q. Are you acquainted with the 86 and ½ acres of land lying immediately east of the Potwin place—what is commonly called the Keith tract?

A. I knew very little about it until I purchased lots in Potwin place. Of course that took me out by it.

Q. Then you first commenced paying attention to this Keith tract about the time that you acquired an interest in Potwin place, did you?

A. I knew that a man by the name of Keith owned that tract of land there. I think I saw his name on the map of the plat of Topeka as a piece of land owned there by Mr. Keith.

Q. Were you acquainted with the market value of this property in the months of June and July, 1886?

A. No, sir; I do not think my knowledge of the value of land was sufficient for me to give an opinion as to its value. I would not like to.

Q. Do you know what property immediately west of this was selling for in June and July, 1886?

A. I know what I paid for the lots I purchased in the Potwin subdivision at the time I purchased.

Q. You purchased in October, 1885?

A. I think it was October, 1885; yes, sir.

Q. How large are those lots in Potwin place—how much do they comprise?

A. They are 122½ feet, I think, in front and 204 feet deep, I believe, is the size of the lots. I understand that there was 70 acres—I think about 70 acres—divided into 80 lots, is my impression.

157 Q. What was the character of the improvements on this Potwin place at this time, in October, 1885?

A. It was laid off into lots and blocks with streets; when my attention was first called to it there was only a house or two upon the plat.

Q. When was your attention first called to it?

A. That was about the time I made the purchase; I made it immediately.

Q. What were these Potwin lots selling for at the time you made your purchase?

A. If I remember right the lowest lots that I remember of now were marked at eight hundred dollars, and the highest one that I remember perhaps some thirteen hundred dollars; they varied according to the location and frontage; that is my general impression.

Q. Was there any extraordinary inducements offered to purchasers of these Potwin lots?

Objected to because it is incompetent, irrelevant, and immaterial.

A. Yes, sir; I thought so.

Q. What were the inducements?

A. They sold them on ten years' time at eight per cent. interest, with a small payment down, I think one hundred dollars, and then with the proposition to furnish half of the cost of the building that should be built on it. No building was to be accepted, I think, of a less value than two thousand dollars, and they would furnish one thousand dollars of the money necessary to build on ten years' time at 8 per cent., as I remember. Those were the inducements.

Cross-examination—questions by Mr. QUINTON:

Q. You were among the first ones, were you not, Mr. Clark,
158 to purchase out in Potwin's addition?

A. I believe so; yes, sir; there had been, perhaps, two or three before I went out there.

Q. Two or three purchasers?

A. Yes, sir.

Q. After that time and between the time you purchased and June and July, 1886, had there not been a good many purchases and quite a number of houses started to be built, if you remember?

A. Yes, sir; lots went off pretty rapidly; how rapidly I do not know, but there had been several sold in the meantime and buildings commenced.

Q. The Potwin place built up rapidly, did it, between the time you bought and June and July, 1886?

A. Yes, sir. Since I purchased there the plat has been pretty well built over.

Q. Is it not a fact that the values of property in Potwin place went up also after you purchased?

A. As a natural consequence, yes, sir; it is higher now than it was then, considerably.

Q. And they had risen considerably in value prior to June and July, 1886?

A. I could not say about that.

Q. What is your best recollection, if you remember?

A. My attention was not called to it; I would not know whether there was any rise or not from the time I purchased, from the fall of 1885 to the middle of the summer of 1886; of course there are parties here who could tell you that.

Q. Is it not a fact, Mr. Clark, that the Keith tract of land lies immediately east of and between Potwin place and the city?

A. Yes, sir; it adjoins the Potwin place on the east.

Q. Would not the fact, Mr. Clark, of building a good class of houses and the actual building of the houses in Potwin place
159 in the manner you have described increase or tend to increase the value of the Keith tract of land?

A. That would be a matter of opinion; I should suppose it would, more or less.

J. T. CLARK.

160 W. F. PARKER, a witness on behalf of the defendants, being by me first carefully examined, cautioned, and solemnly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

Direct examination—questions by Mr. SMITH:

Q. What is your name, age, place of residence, and occupation?

A. W. F. Parker; residence, Topeka, Kansas; occupation, real-estate agent; age, 50 years.

Q. How long have you been engaged in the real-estate business in Topeka?

A. 17 and ½ years.

Q. Continually?

A. Yes, sir.

Q. Have you carried on quite an extensive business in that connection?

A. I have made that my business, of selling, renting, collecting, and so on.

Q. Were you acquainted with the market value of real estate in the vicinity of Topeka during the months of June and July, 1886?

A. Well, somewhat; yes, sir; that would come under my attention and notice.

Q. Do you know what is commonly called the Keith tract, being a tract of 86 and one-half acres, situated in the southeast quarter of section 25, adjacent to the city of Topeka on the northwest?

A. I know the tract of land that is commonly called the Keith tract.

Q. From your experience as a real-estate agent and familiar
161 with the market value of property in the vicinity of Topeka in the months of June and July, 1886, what do you consider a fair market price for this 86 and ½ acres, taking it as one entire body, to be?

Objected to by complainant on the ground that he has not shown that he was acquainted with the market value of the land at that time.

A. My opinion is that the tract of land was worth about $800 an acre.

Cross-examination—questions by Mr. QUINTON:

Q. Did any one seek to purchase this tract of land of you as a real-estate agent?

A. No, sir.

Q. Did any one ever make any inquiry of you as to the purchase of it during the months of June and July, 1886?

A. I don't think there was.

Q. Was your attention particularly called to this tract of land, Mr. Parker, during the months of June and July, 1886?

A. Not to my recollection now.

Q. Were you acquainted with the value of lots immediately adjoining the Keith tract of land during the months of June and July, 1886?

A. It has been running over quite a long period, and I cannot definitely state dates, but I think I know something about it. I did not have at that time anything for sale in that addition; I only knew from hearsay.

Q. You would not definitely state, would you, Mr. Parker, that $800 an acre was all that that land would have sold for in the months of June and July, 1886?

A. No, sir; I don't say so.

Q. Did you have any property immediately adjoining the
162 Keith tract of land for sale during the months of June and July, 1886?

A. I did not; not by the acre. I had some lots that was near by.

Q. I believe you stated you had no tracts of land in that neighborhood for sale during these two months.

A. Not immediately adjoining it. I think I had a tract of land north of it, down on the bottom.

Q. Is it not a fact, Mr. Parker, that this tract of land could have been worth more than $800 an acre and would have sold for more than that in the months of June and July, 1886, and you not have known it?

A. Certainly.

Redirect examination—questions by Mr. SMITH:

Q. You are simply giving your opinion as to the value of this property as a real-estate agent in business in the city of Topeka, are you?

A. Yes, sir.

W. F. PARKER.

163 D. L. LAKIN, a witness on behalf of the defendants, being by me first carefully examined, cautioned, and solemnly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

Direct examination—questions by Mr. SMITH:

Q. What is your name, age, place of residence, and occupation?

A. David L. Lakin; my age is 57; I live on a tract of land adjoining the city of Topeka at this time; I am about as near retired as I can be.

Q. How long have you lived in the vicinity of Topeka, about?

A. Do you mean by that how long have I lived outside of the city, in the vicinity?

Q. Yes.

A. Does that include in the vicinity?

Q. In Topeka and the vicinity.

A. I have been mostly here since about 1862.

Q. Do you know where the piece of property commonly called the Keith tract is located?

A. Yes, sir; I know of one tract that is commonly called the Keith tract.

Q. Being a tract of about eighty-six and one-half acres?

A. Yes, sir; I have usually understood it as being about half a quarter.

Q. How far do you live from that?

A. Well, less than half a mile.

Q. Are you the owner of considerable property lying adjacent to the city of Topeka?

A. No, sir; I am not now.

Q. Does your wife own some property lying adjacent to the city of Topeka?

164 A. She does; a small tract of ten or twelve acres.

Q. That is the property upon which you reside, is it?

A. Yes, sir.

Q. Were you acquainted with the market value of property in the vicinity of Topeka in the months of June and July, 1886?

A. Well, I can't say that I was very largely acquainted. I was somewhat acquainted by talking with my friends who were buying and selling property.

Q. From the information that you received in talking with your friends and the general information that you possessed from living in Topeka the number of years that you have, what, according to your views, would be a fair valuation of this Keith tract of property in the months of June and July, 1886?

Objected to for the reason that it is not shown that the witness was acquainted with the market value of property or any property in or about Topeka.

A. Well, at the time it was sold—I can't tell just what time that was, but at the time I understood Mr. Farnsworth bought it I think he paid a pretty good price for it—about, I believe, $700 or $800 an acre.

Cross-examination—questions by Mr. QUINTON:

Q. You have stated at the time Mr. Farnsworth bought it?

A. Yes, sir.

Q. What land have you reference to there?

A. I did not mean Farnsworth. I meant the time that Kellam and Holliday bought it.

Q. How long after, Mr. Lakin, was it that Kellam and Holliday bought this tract of land that your attention was called to its value, if at all?

A. Right then.

Q. Who spoke to you about it then?

165 A. Oh, it was talked about by a great many of my old friends here talking about the sale.

Q. As a matter of fact, Mr. Lakin, from anything that you know to the contrary, could not that land have been worth more than that in the market and could it not have sold for more than that at that time?

A. Oh, I could not answer that.

Q. You don't know whether it was or not, then, do you?

A. I could not say positively.

Q. Then you have nothing or no knowledge of the values—market values—of property around Topeka at that time by which you put this price upon the property, have you?

A. Well, to answer that question I should have to circumlocute a little. I could not say yes or no.

Q. You were not actively engaged in buying and selling land yourself at that time, were you?

A. No, sir.

Q. You speak of your wife owning some land adjoining the city of Topeka; where is that located?

A. That is located about—less than half a mile of the tract spoken of.

Q. Is it not a little further north than the most of the Keith tract of land?

A. I think not. I think it would be about the center of it—that is, running a due east and west line, I think it would be south of the center.

Q. What would you have considered the value of your wife's tract of land that you have just spoken of in the months of June and July, 1886?

A. Well, the tract of land that she owns has the homestead on it—that is, it has our improvements.

166 Q. I do not care for a description of it; I just want to know what you consider the value of that tract of land during the months of June and July, 1886?

A. I never put any value upon it. I never considered it a matter of dollars and cents at all; it was a place to live on, and that was all the consideration that I ever gave it.

Q. Yet, Mr. Lakin, you could judge of the value of that tract of land from what information you knew of the values of property in Topeka as well as you could of the Keith tract of land, could you not?

A. I could have done it; yes, sir; if my attention was drawn to it in the same way.

Q. Your attention is called to it now?

A. Yes, sir.

Q. What, then, would you consider the value of that tract of land without the improvements—the house—in the months of June and July, 1886?

A. That I could not tell you so well as I could if you had asked me then what I would have considered it worth.

Q. Is it not a fact, Mr. Lakin, that you do not remember very distinctly any little incidents that happened a year or two or three years ago that you have no particular interest in yourself?

A. Yes, sir; that is the truth. I would have to have something to impress me.

Q. I will ask you, Mr. Lakin, if it is not a fact that you have suffered from a stroke of paralysis since that time?

A. Yes, sir; I have a long time previous and since continuously.

167 Q. Has not that, Mr. Lakin, in your opinion, materially affected your memory as to little incidents or things of this kind or anything?

A. Very much.

168 G. G. GAGE, a witness called on behalf of the defendants, being by me first carefully examined, cautioned, and solemnly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

Direct examination—questions by Mr. SMITH:

Q. What is your name, age, place of residence, and occupation?

A. G. G. Gage; I live in Topeka, Shawnee county, Kansas; my age is 53 years, and my occupation—sometimes I am put down on the city register as a laborer and sometimes as a capitalist—laborer, I guess, would be the proper thing.

Q. You have combined all those various occupations, have you?

A. Yes, sir.

Q. Are you the owner of considerable property in the vicinity of Topeka and Topeka?

A. Yes, sir; I own some property in and about Topeka.

Q. What is the character of that property?

A. Well, I own some avenue property and I own some residence property in the city of Topeka—business property and residence

property; then I own some land west of Topeka—two miles west of Topeka.

Q. Were you acquainted with the values of property in the vicinity of Topeka in the months of June and July, 1886—the market values?

A. Well, I don't know. I was here in 1886, and I have been acquainted with the values of property, more or less, for the last 30 years—more than 30 years.

Q. Do you know a piece of property that is commonly called the Keith property, being a tract of 86 and one-half acres, lying adjacent to the city of Topeka?

169 A. Yes, sir.

Q. From your knowledge of the values of property, what would you say was the market value of this property, taking it in one entire tract, in the months of June and July, 1886, would be?

Objected to because it has not been shown that the witness is acquainted with the market values of property in and around Topeka or of theis tract of land.

A. Well, I could only tell the market value as compared with other values about that time; what other property sold for, I suppose.

Q. That is a very proper way to determine it. What would you fix it to be in June and July, 1886?

A. As compared with other pieces of property, about the same amount and same distance from town, and so on, that would be the only way I could tell. I have one or two pieces in my mind now that sold at that time.

Q. Well, taking all those various elements in consideration, together with your general knowledge as to the values of real estate, what would you say was a fair market value for this property in the months of June and July, 1886?

A. Well, I should think that $800 was a fair valuation per acre—a fair price for the land at that time; the way that other property that I have in my mind sold at, I should think it would be.

Q. Can you state when, during the year 1886, if ever, there was a rapid increase in values of suburban property in the vicinity of Topeka?

A. Well, in 1886, yes; I think that property was increasing—suburban property was in 1886, but it was not as large an increase nearly as it was in 1887.

Q. Do you remember whether there was a marked increase

170 in values of suburban property during the months of August and September, 1886?

A. I don't remember just the time that the increase commenced, the buying of suburban property in large bodies and cutting it up.

Cross-examination—questions by Mr. QUINTON:

Q. Mr. Gage, from your knowledge of the values of property in and around Topeka during the months of June and July, 1886, you could not say, could you, that the price you have named for that

land was all it would have sold for or all it was worth in those months, positively?

A. I could not say what it would have sold for or what it was worth, but as compared to other property that was selling about that time—for instance, we will take Bolles place, the Martin & Dennis—that is all the way I can judge of those things. I don't know anything of the values.

Q. I was asking you if you knew of your own knowledge, positively, whether that was all that the land would have sold for at that time.

A. No, sir.

Q. Might it not, Mr. Gage, have been worth and could have been sold for a great deal more money during the months of June and July, from anything that you know positively?

A. It might have been sold for more money, for anything that I know of.

Q. You were not engaged actively in buying and selling property in those months, were you?

A. No, sir; there was not much property selling then.

Q. I will ask you if you remember the sale of the Dan. Horne tract of land?

171 A. Which one—the last five or seven acres that he sold there? He has had so many tracts of land in the last 30 years that have been sold off in tracts. His homestead, do you mean?

Q. I mean the tract of land that Dan. Horne sold about June or July, 1886.

A. No, sir; I do not; unless it was that last tract that he had, where his residence was—six or eight or ten acres—near the hospital.

Q. Is it not a fact, Mr. Gage, that property in Topeka and around it increased in value right along all the time during the year 1886?

A. Yes, sir, and for years before; four years at least—four or five.

Q. You do not pretend to be acquainted with the values of property in and about Topeka during those months to the same extent as men actively engaged in selling and buying property, such as J. N. Strickler, J. S. Collins, George W. Watson, J. B. Bartholomew, or Handy and Stringham, for property adjoining the city?

A. No, sir; I was not dealing in anything of the kind; consequently my attention was not called to any suburban property.

Q. Did you own a tract of land lying near to the city of Topeka during the year 1886?

A. Well, I owned some; yes, sir; it lies about a mile and a half west of the west limits of the city of Topeka.

Q. Is it not about a mile and a half or two miles west of the Keith tract of land also?

A. Yes, sir.

Q. Did you own any other land outside of the city?

A. I don't remember that I did—not outside of the city limits.

172 Q. Did you sell or have you sold this tract of land that you speak of or that you owned, lying west of the city?

A. Yes, sir; a portion of it.

Q. What was the desirability of the portion you sold as compared with the portion that you kept?

A. Well, that would be a matter of judgment a good deal.

Q. It is your judgment that I am wanting.

A. I had 170 acres. I sold the west 90 acres at $500 an acre, from Tenth street to Sixth, and kept the east 80, and I sold the north 60 acres of the east 80 for six hundred dollars an acre.

Q. My question was, Mr. Gage, what was the desirability of the portion you sold as compared with the portion that you kept?

A. In my judgment, that that I kept was worth at least double.

Q. What you sold?

A. Well, I was offered more than double for it, that I sold.

Q. That tract of land you say lies about a mile and a half or two miles west of the Keith tract and from the city limits?

A. Well, it lies probably from the corner of the Keith tract that far; it lies a little south of the Keith tract.

Q. And west?

A. Yes, sir.

Q. And that distance from the city limits west?

A. Yes, sir; from the original city limits a mile square I co-racted to sell. I have not deeded anything yet.

Redirect examination—questions by Mr. SMITH:

Q. When did you contract to sell?

A. I contracted to sell in March, 1887—the 9th day of March.

Q. The boom was on in full capacity at that time, was it not?

173 A. Well, I thought so.

Q. Do you know what the Dan. Horne tract sold for?

A. I do not, sir; not in 1886.

174 JOHN R. MULVANE, a witness on behalf of the defendant, being first carefully by me examined, cautioned, and solemnly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

Direct examination—questions by Mr. SMITH:

Q. What is your name, age, place of residence, and occupation?

A. John R. Mulvane; age, 52 years; occupation, banker. I live in Topeka, Kansas.

Q. What bank are you connected with?

A. The Bank of Topeka.

Q. In what capacity?

A. President of the Bank of Topeka.

Q. How long have you resided in Topeka?

A. Twenty years this December.

Q. How long have you been president of the Bank of Topeka?

A. Since its organization—the Bank of Topeka, three years—of

the Topeka bank. I was connected with it some ten years before that.

Q. During your residence in Topeka have you been interested in real estate?

A. I have owned some and sold a little.

Q. Were you, in the months of June and July, 1886, acquainted with the market values of property in Topeka and its vicinity?

A. That is a very hard question to answer. I am not in that line of business, and yet I have my ideas of values.

Q. From what would you obtain your ideas of value—from your experience?

A. From my past experience.

Q. And that experience extends over a period of some
175 twenty years, does it?

A. Yes, sir.

Q. Do you think that in June and July, 1886, you were acquainted with the values of property in Topeka and vicinity?

A. I would say I was fairly acquainted.

Q. Are you acquainted with the piece of property commonly called the Keith tract of land, lying northwest of the city of Topeka?

A. Yes, sir; I know of it.

Q. Being the piece of land in controversy in this suit?

A. Yes, sir; I know of the land.

Q. From your business experience, extending over the period of time that you have mentioned, and your knowledge of the values of real estate in Topeka and its vicinity, and your dealings in real-estate matters, what would you say would be a fair market value for this Keith property, taken as an entire tract, in the months of June and July, 1886?

Objected to because witness has not shown himself possessed of a knowledge of the market value of the Keith tract at that time.

A. I thought at the time of the sale that it was a fair price.

Q. What sale do you refer to?

A. The sale announced as made by Mr. Keith to Mr. Kellum.

Q. And Mr. Holliday?

A. Kellam and Holliday; yes, sir.

Q. What period in the year 1886 would you fix as the time that suburban property rapidly increased in value, if it did increase rapidly at any time?

A. I think there was a general rise. I don't know as in
176 1886 there was any special boom. The boom came in 1887.

Q. All through the summer and fall of 1886 there was a steady increase in values in Topeka and its vicinity, was there?

A. That has been my idea of it; that is my idea, that there was a general increase during that season and the season before, too.

Cross-examination—questions by Mr. QUINTON:

Q. You were not engaged, were you, Mr. Mulvane, actively in the

buying or selling of property during the months of June and July, 1886?

A. I was not.

Q. You could not state from your own positive knowledge of the values of property in Topeka that that tract of land was not worth more than what you have valued it at during those months, could you?

A. No, sir.

Q. Is it not a fact that men who were engaged actively in the real-estate business, buying and selling additions and property in and about Topeka, and whose attentions were particularly called to this tract of land, such as J. B. Bartholomew, George W. Watson, J. N. Strickler, J. S. Collins, Mr. Handy, and Mr. Stringham, would know what the value of this land was better than yourself during those months?

A. I would think their judgment ought to be full better than mine, and yet I would want to buy on my judgment as against theirs.

Q. You do not know, do you, whether or not there had been offers made for the land a great deal higher than the one you have spoken of here during those months, do you?

A. I never knew of any being made.

Q. Did you have your attention particularly called to that
177 tract of land either to buy or sell it or be interested in it during those months?

A. No, sir.

Q. Was there not a gradual increase in the values of property in and about Topeka during the year 1886, from late in the winter or early in the spring on through?

A. I think there was.

Q. You had no particular grounds or reasons for believing that that was a fair price paid for that property at the time you mention, have you?

A. I was negotiating for a piece of land east of the city——

Q. That is not what I asked you. The question was, You had no particular grounds or reasons for believing that that was a fair price paid for that property at the time you mentioned, have you?

A. Yes; but as a matter of course my ideas of value were somewhat comparative.

Q. Is it not a fact, Mr. Mulvane, that improvements and additions were being built up more rapidly in the west part of the city than they were in the east part during that time?

A. Yes, sir.

Q. Is it not a fact that the increase of prices of land in the west part of the city, in and about this tract of land, was greater than it was on the lands lying east of the city?

A. No; I don't know as you could specify that particular tract. You take the whole west side of the city and I think that would be a fact.

Q. To go to lands lying east of the city is it not necessary, Mr.

Mulvane, to cross the railroad tracks and the Shunguanungua creek and bottom of the creek?

A. Yes, sir; it is some detriment, but offset, on the other hand, by railroad depots and railroad shops and business in that direction. It has an advantage and a disadvantage.

178 Q. Had business gone east of the railroad track to any considerable extent at that time, Mr. Mulvane?

A. No; it has not.

Q. Lying immediately east of the city is there not a large bottom tract of land that is low and in which the roads are unusually very bad?

A. Yes, sir; but it is the nearest to the city; into the heart of the city, the business part of it.

Q. There are no railroad tracks or bottom land or creeks or objectionable features of that kind lying between the Keith tract of land and the city, is there?

A. No, sir; it is delightfully located.

Redirect examination—questions by Mr. SMITH:

—. You stated in response to a question on cross-examination that if you were purchasing property you would rely upon your own judgment rather than upon the judgment of certain real-estate dealers as to the value of that property. I wish you would state why you would rely upon your own judgment.

A. Real-estate dealers are like most all dealers. They are influenced largely by the atmosphere that surrounds them, and their judgments are not always the best; that is a general rule, that they should be the best, but not always.

Recross-examination—questions by Mr. QUINTON:

Q. Would you not consider, Mr. Mulvane, that men who were buying property for themselves and selling property and buying for the purpose of selling it, men who would have pretty sound judgment or would know very well the value of that tract of land at that time?

A. Under ordinary circumstances I would, unless influenced by a boom that had warped their better opinions.

J. R. MULVANE.

179 The further taking of this testimony was here adjourned until Monday, November 7th, 1887, at the hour of 9 o'clock a. m., at the same place.

LESTER S. WILSON, *Examiner.*

Parties met pursuant to adjournment.

Present as at the last session, and the following proceedings were had:

GEORGE W. REED, a witness on behalf of the defendants, being by me first carefully examined, cautioned, and solemnly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

Direct examination—questions by Mr. SMITH:

Q. What is your name, age, place of residence, and occupation?

A. George W. Reed; residence, Topeka, Kansas; age, 43 years; my occupation for five years was publishing the daily Journal here. Since then I have been engaged in the printing and publishing business at 831 Kansas avenue.

Q. Have you ever been in the real-estate business here?

A. I have and am now.

Q. How long have you been interested in the real-estate business?

A. I was in the firm of Swallow & Reed, commencing in 1878 or 1877, with J. R. Swallow. We were in the business until just before he died. I was the Reed of that firm. I am now with H. A. Pierce & Company. I am one of the company at the present time.

Q. Are you acquainted with what was the market value of property in the vicinity of Topeka in the months of June and July, 1886?

A. I think I am, sir.

180 Q. Are you acquainted with what is commonly known as the Keith tract of land, being 86 and ½ acres, situated on the northwest portion of the city limits or which joins the city limits on the northwest?

A. Meaning the tract this side of the Potwin place?

Q. Yes.

A. Yes, sir.

Q. Being the land in controversy in this suit?

A. Yes, sir.

Q. What would you say was the market value of this 86½-acre tract as one entire body in the months of June and July, 1886.

Objected to on the grounds that the witness is not shown to have a knowledge of the market values of land in and around Topeka.

A. I can explain the answer, can I?

Q. Certainly.

A. I understood at the time the parties purchased it that they paid $60,000 for it, and I was inclined to the belief that it was a good trade for them. Later I had occasion to purchase for a customer twenty acres adjoining it on the north, running from that tract to the river, and became very familiar with the lay of the land, having traveled over it a great many times in going over to the other purchase during the negotiations, and I somewhat changed my mind in regard to the value of the purchase at that time. The property adjoining Potwin place and the south end is very valuable. It lies nicely, but there is a deep swail running through it, and the north end slopes off suddenly, running down to the river. I think at the time they bought it that they paid a fair price for it.

Q. Then do you think they paid the market price for that property at the time they purchased it as an entirety?

A. The matter has come up in discussion——

Q. Please answer the question directly.

A. I do.

181 Cross-examination—questions by Mr. QUINTON:

Q. You say you are engaged in the printing and publishing business?

A. Yes, sir.

Q. Is it not a fact, Colonel, that that keeps your time employed most of the time?

A. It ought to, but it don't.

Q. I will ask you if you were actively engaged in buying and selling real estate in and around Topeka in the months of June and July, 1886.

A. Well, yes and no.

Q. I will ask you, Colonel, if your attention was called particularly to this tract of land, in buying it or selling it, during those two months of June and July, 1886.

A. At that time it was a large transaction——

Q. Please answer directly if you can.

A. My attention was called to it; yes, sir.

Q. You do not know, do you, whether or not there was more money offered for that tract of land than the price you say they paid for it during those two months?

A. I do not; no, sir.

Q. There could have been and you not know it?

A. Certainly.

Q. Is it not a fact, Mr. Reed, from what you know of the transfers of real estate in Topeka in the months of June and July, 1886, that this land could have been much more valuable than the price you put on it and you not have known it?

A. I think not.

Q. Do you pretend to say that there could not have been offered more than $60,000 repeatedly, time and time again, for this tract of land during those two months and you not know it?

182 A. I don't pretend to say so.

Q. The market value of land as you understand it, is it not, is what it will sell for at any time?

A. Well, you take——

Q. Please answer directly if you can.

A. I don't see how I can.

Q. It can be answered directly.

A. It would be impossible *to* me as a witness to tell what has been offered for——

Q. That is not what I asked you. The question was, Do you not understand the market value of land to be what it would sell for at any particular time?

A. In an open transaction, yes, sir.

Q. If, then, there had been several offers made for this tract of land, and people had sought to purchase it for a price far in excess of the one you have named, you are mistaken as to what the market value of that land was at that time, are you not?

A. No, sir. The others are as likely to be mistaken as I am.

Q. I am asking you plain, square questions, and I want you to

answer them. The market value of a piece of land is what it will sell for if it is placed on the market and sold to-day, is it not?

A. If it is placed in the open market, yes, sir.

Q. If, then, people stand in the open market to pay a larger price or larger sum for this tract of land during the months of June and July, 1886, than the one you have named, you are mistaken as to what the market value of that land was when you place it at the price you do?

A. I should think they were as likely to be mistaken in offering more.

Q. Then, when you say that the market value of that piece of land in June and July, 1886, was the price you put upon it,

183 you are not basing your statement upon what it would have sold for at that time, but what you think it was worth?

A. I am basing my statement upon my opinion of its value at the time.

Redirect examination—questions by Mr. SMITH:

Q. Were you engaged in the real-estate business in May and June, 1886?

A. No, sir.

184 HENRY TAYLOR, a witness on behalf of the defendants, being by me first carefully examined, cautioned, and solemnly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

Direct examination—questions by Mr. SMITH:

Q. What is your name, age, place of residence, and occupation?

A. Henry Taylor. I live at 706 Sixth street west, Topeka, Kansas.

Q. Your age?

A. 52 years.

Q. How long have you lived in the city of Topeka?

A. 7 or 8 years.

Q. What business have you been engaged in during that time?

A. I have been handling real estate most of the time. I was banking when I first came here.

Q. Were you acquainted with the market values of property in and in the vicinity of Topeka in the months of June and July, 1886?

A. Yes, sir.

Q. At that time and are you now acquainted with what is known as the Keith tract of land, being 86 and ½ acres of land lying on the northwest portion of the city limits, being directly east of the Potwin place?

A. Yes, sir; I know the tract of land.

Q. From your experience in handling real estate and knowledge of the market value of property, what, in your opinion, was the value of that property, taking it in one entire body, in the months of June and July, 1886?

Objected to because it is not shown that he knew the market value of this tract of land.

A. Well, can I answer from what land sold for about that
185 and what that sold for—what I know of that selling for.

Q. Just answer from your own information. The question was, From your experience in handling real estate and knowledge of the market value of property, what, in your opinion, was the value of that property, taking it in one entire body, in the months of June and July, 1886?

Same objection.

A. Why, it was worth between seven and eight hundred dollars an acre.

Cross-examination—questions by Mr. QUINTON:

Q. When you say it was worth between seven and eight hundred dollars an acre, Mr. Taylor, does not the fact of what it sold for at that time form a principal basis by which you judge of that?

A. Why, in part; not wholly.

Q. Were you actively engaged in buying or selling any tracts of land of that kind either in or around Topeka during the months of June and July, 1886?

A. Well, I was not actively engaged in it. I was buying some and selling some.

Q. Tracts of land of that size?

A. I don't think I bought any of 80 acres or offered any. I don't remember anything of that kind.

Q. What do you understand, Mr. Taylor, to be the market value of a piece of land?

A. What it will sell for usually.

Q. Do you know of your own positive knowledge, Mr. Taylor, whether or not that land would have sold on the market at that time for a great deal more money than you have testified to?

A. I don't think it would with any one that could pay for it.

Q. I asked you if you know of your own positive knowl-
186 edge whether it would or not.

A. I do not.

Q. Do you know whether or not there had not been a great deal more money offered for that land at that time than the price you have stated?

A. do not.

Q. Is it not a fact, Mr. Taylor, that men dealing in real estate here actively at that time, such as J. N. Strickler, George W. Watson, J. S. Collins, Dr. Linn, Joe Wilson, and J. B. Bartholomew, would have been more apt to have known of the actual value of that land during those two months of June and July, 1886, if their attention was particularly directed to it at that time, than you do from what you know of it?

A. Oh, I don't know anything about that. They might have had

facilities of knowing about real estate or the value of real estate more than I have. I can't say anything about that.

Q. You don't pretend to say, do you, Mr. Taylor, from what you know about it that that land would not have sold for more than the amount you have named during those two months, do you?

A. I think it would have been difficult to have found men who would have paid any more than that for it that could have paid for it.

Q. I will ask you if your attention during those two months of June and July was particularly directed or called to this tract of land.

A. My attention has been called to it for a good many years.

Q. Please answer my question. The question was, I will ask you if your attention during those two months of June and July was particularly directed or called to this tract of land.

A. Yes, sir.

Q. Did you seek to buy it during those two months?

187 A. I did not.

Q. Did any one seek to buy it of you?

A. No, sir.

Q. Did you know what land in Potwin place was selling for at that time?

A. I did.

Q. What was land selling for at Potwin place during the months of June and July, 1886?

A. I do not know of any being sold only by the lots.

Q. The question was, What was land selling for at Potwin place during the months of June and July, 1886?

A. I don't know.

Q. What was land selling for immediately adjoining this Keith tract of land on the south during the months of June and July, 1886?

A. I don't know of anything there but the Haines addition, south of it. Lots in there were selling—some of them for two hundred and fifty dollars.

Q. Is it not a fact now, Mr. Taylor, that Haines's addition lies farther west, the whole of it, than this Keith tract of land?

A. It does.

Q. It does not lie, then, on the south of it?

A. It lies south of Potwin place.

Q. I am talking of the Keith land.

A. Well, those are lots——

Q. I am asking you if you know what land was selling for adjoining this Keith tract of land on the south.

A. I do, by the lot.

Q. What were lots selling for adjoining this Keith tract of land on the south, Mr. Taylor?

A. Well, so far as my knowledge goes, some of them sold

188 for $400 a lot and some for $500, perhaps, and some might have sold for $600. I don't know of but one instance that I can give.

Q. These lots were 25 feet wide by 150 feet deep, were they not?

A. I can't say about that.

Q. In fact you are not very well acquainted with what land was selling for right adjoining that land on the south, were you?

A. I have got a general view or opinion about it; that is all.

Q. Do you know what land was selling for by the acre immediately adjoining the Keith tract of land upon the east during the months of June and July, 1886?

A. I don't know whether that is the Ward addition or whether there is some vacant land in there; I don't know.

Q. You are not very well acquainted with the land around there, are you?

A. Oh, I have been over it a few times.

Q. Do you know of the fact of an acre of land adjoining the Keith tract of land upon the east—of the comparatively low land adjoining the Keith tract of land upon the east—being sold to a school district for thirteen hundred dollars prior to that time?

A. I heard about it.

Q. In fact the most you know about this tract of land is what you have heard—just your general notion?

A. Well, I presume that I have been over that land as much as any one in the city that did not own it.

Q. Do you pretend to derive your information as to the value of that land from looking at it or being on it—going over it?

A. From the surroundings and the growth of this city.

Q. When were you first asked in regard to testifying in this case, Mr. Taylor, about the value of that land?

189 A. I think, perhaps, a week ago; perhaps ten days ago. I don't remember exactly.

Q. Have you bought and sold real estate for anybody else during the months of June and July, 1886?

A. No, sir.

Q. All the real-estate dealings, then, that you have had have been strictly for yourself—yourself the purchaser?

A. Yes, sir.

Q. Have you ever bought as large a tract of land as that located as near to the city as this during the months of June and July or during the year 1886?

A. No, sir.

Q. Did you during the year 1886 buy any tract of land located as near the city as this—adjoining the city at all?

A. No, sir.

190 J. B. WHITAKER, a witness on behalf of the defendants, being by me first carefully examined, cautioned, and solemnly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

Direct examination—questions by Mr. SMITH:

Q. What is your name, age, place of residence, and occupation?

A. J. B. Whitaker; 55 years of age; Topeka, Kansas, is my place of residence; I am engaged in the real-estate business.

Q. How long have you resided in the city of Topeka?

A. 30 years.

Q. How long have you been engaged in the real-estate business?

A. 35 years.

Q. Are you acquainted with the market value of real estate in Topeka and its vicinity in the months of June and July, 1886?

A. Yes, sir; I knew something of the values of that kind.

Q. Are you acquainted with the piece of property commonly called the Keith property, comprising a tract of 86 and ½ acres, lying adjacent to the northwest portion of the city?

A. Yes, sir.

Q. How long have you been acquainted with that piece of property?

A. 25 or 30 years.

Q. Were you acquainted with its value in the months of June and July, 1886—the market value?

A. Well, I have a kind of an idea as to what it was worth at that time. I have an opinion as to what it was worth.

Q. That idea and opinion, is it based upon the knowledge you acquired in the real-estate business in Topeka and vicinity?

191 A. Yes, sir.

Q. What would you state the market value of this piece of property to be, in an entirety, in the months of June and July, 1886?

A. Seven or eight hundred dollars an acre.

Cross-examination—questions by Mr. QUINTON:

Q. You are engaged particularly, are you not, Mr. Whitaker, in the abstract business?

A. Yes, sir; principally.

Q. During the months of June and July, 1886, were you not very busily engaged in that business?

A. During the months of June and July, 1886, I was selling lots in the west part of Topeka as well as being in that business. I sold during the year 1886——

Q. Well, what I asked you, Mr. Whitaker, was if you were not busily engaged in the abstract business during those months.

A. Oh, yes; I am busy all the time.

Q. What do you understand by the market value of a piece of land?

A. About what it would sell for.

Q. Did you sell or buy yourself any tract of land in or around the city of Topeka, located as this is, as near to the city, during those two months of June and July, 1886?

A. I sold during that year——

Q. No; just answer my question.

A. Well, I can't tell you whether in June or July. I sold during the year land very similarly situated to this land.

Q. Tracts of land?

A. Yes, sir.

Q. As large as this?

A. No, sir; not as large as this. I sold out 60 lots that
192 season.

Q. It was sold off in lots, was it not?

A. Yes, sir.

Q. I will ask you if you sold any tract of land similarly situated to this during that time.

A. No, sir; there has not anybody sold any tracts of land similar to this, for there is no such other tract.

Q. That is what I was getting at, Mr. Whitaker. Where were these 60 lots that you sold?

A. They were between Sixth and Eighth streets, between Lane and Horne streets, right at the end of the Sixth-street railway.

Q. Did you seek to purchase or did you have any one seek to purchase of you this Keith tract of land during those two months?

A. No, sir; nor at any other time.

Q. During those two months—June and July, 1886—was your attention particularly called to the value of this tract of land?

A. No, sir.

Q. Is it not a fact, Mr. Whitaker, that from anything that you know positively to the contrary that this land would have sold or might have sold in the months of June and July, 1886, for a great deal more money than you have stated here from anything that you know to the contrary positively?

A. For anything that I know to the contrary it might have sold for $5,000 an acre.

Q. I will ask you if you are acquainted with the value of lands during the months of June and July, 1886, immediately to the west of the Keith tract of land, in what is called the Potwin place.

A. Yes, sir.

Q. I will ask you what land was worth in the Potwin place dur-
ing the months of June and July, 1886.

193 A. I know what they were asking for it, I think, but I don't know what it was worth; but there were very few sales being made at that time.

Q. I will ask you if you know what land was worth—the market value of the land immediately south of the Keith tract of land—during the months of June and July, if you know.

A. I know what it was selling for—about what it was selling for—at that time; not immediately south, but adjoining that neighborhood.

Q. Immediately adjoining that Keith tract of land?

A. I say there was no sale made in either of those two months of land adjoining—south of the Keith land.

Q. Do you know as a positive fact, Mr. Whitaker, that there was no lots or lands sold during the months of June and July immediately south of this Keith tract of land?

A. I do; yes, sir.

Q. Are you acquainted or do you know of the Throop tract of land?

A. Yes, sir.

Q. Do you know what that sold for?

A. Yes, sir.

Q. What was it?

A. In that season it sold for one thousand dollars an acre in acre tracts.

Q. Are you acquainted and do you know of the Sam. Cross tract of land?

A. Yes, sir.

Q. Do you know what that sold for?

A. I think that sold—no; I will not say that I know what that sold for.

Q. Are you acquainted with the fact of the sale of an acre
194 of land of Mrs. Ward's to a school district adjoining this Keith tract of land?

A. I know that Mrs. Ward sold—no; I don't know that Mrs. Ward sold it. I know that the school board bought an acre of land in there, but I don't know who owned it; I thought they bought of Stevenson.

Q. Do you know or were you informed what the school district paid for that acre of land?

A. I don't remember.

Q. Do you know what land was selling at or were you informed what land was selling for in the Potwin place at that time?

A. Twelve hundred dollars was what they were asking on long time.

Q. For how much ground, do you understand?

A. I think it was in acre lots or about acre lots.

Q. There was about 70 acres of the Potwin place divided into 80 lots, was there not?

A. I don't know; I know they sell them for acre lots; they can't be very far different from an acre; I don't know exactly whether they are full or not.

Q. This Keith tract of land lies between Potwin place and the city of Topeka proper, does it not?

A. No, sir; not exactly; it lies between the Potwin place and the Ward tract and between the Cross property and the Ward tract. The Potwin land does not run as far north as the Keith land does.

Q. The principal part of the Keith land lies between the Potwin place, does it not, and the city?

A. It lies between the Potwin place and Mrs. Ward's place.

Q. Well, its relative position to the city—is it not a fact that you have to pass by the Keith tract of land to get to the
195 Potwin place—in going to the city or coming from the city to the Potwin place?

A. Yes, sir.

Q. Do you know whether or not the south part or any portion of the Ward place being sold and platted?

A. Yes, sir; it has been sold, and there was a small part of it that has been platted. The most of it has never been platted.

Q. Do you know what lots were selling for in that part that has been platted?

A. What they were selling for at that time?

Q. Yes, sir.

A. Unimproved lots, I think, were selling at about $200 at that time.

Q. There is about eight lots in an acre, is there not?

A. There is about seven lots in an acre.

Q. Besides the streets and alleys?

A. No, sir; including streets and alleys; an acre of land makes seven lots and streets and alleys.

Q. Then there were seven lots and streets and alleys in an acre of land?

A. Certainly; I am talking about the city lots in these additions; in additions they work in ten and twelve lots.

Q. You were not engaged at any time during the months of June and July, 1886, in buying and selling tracts of land lying near the city of Topeka and located as that is, of that size, were you?

A. I don't know that I either bought or sold during that time a tract of that size.

Q. Is it not a fact, Mr. Whitaker, that offers could have been made or that parties would have been willing to have paid a much larger sum for that tract of land and you not have known about it?

196 A. As I said before, the property might have been sold for five thousand dollars an acre, but that is not what I would think it would be worth.

Q. When you say, then, what you think it was worth you do not base that entirely upon what you think it would have sold for at that time, then?

A. I do.

Q. Did you not just state that from anything you know the land might have been sold for a great deal more money than that?

A. Yes, sir.

J. B. WHITAKER.

197 C. W. JEWELL, a witness on behalf of the defendants, being by me first carefully examined, cautioned, and solemnly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

Direct examination—questions by Mr. SMITH:

Q. What is your name, age, place of residence, and occupation?

A. C. W. Jewell; I live in Topeka, Kansas; I am 60 years of age.

Q. What is your occupation?

A. At this time?

Q. Yes, sir.

A. I don't know that I can hardly say I have an occupation now. I sold out my business last spring.

Q. What business were you engaged in prior to selling it?

A. Banking business.

Q. How long have you been engaged in that business in the city of Topeka?

A. 20 years.

Q. How long have you resided in the city of Topeka?

A. 23 years, about. 23 years last July, I think.

Q. While engaged in the banking business in the city of Topeka has your attention been directed to the values of real estate?

A. Yes, sir; somewhat.

Q. Were you acquainted with the values of real estate in the city of Topeka and of property lying adjacent to the city of Topeka in the months of June and July, 1886?

A. Yes, sir; I was somewhat acquainted with the values of real estate at that time.

Q. Are you acquainted with what is commonly called the Keith tract of land, comprising 86 and ½ acres of property, lying
198 adjacent to the northwest corner of the city?

A. Yes, sir; I have known the property a good while.

Q. How long have you been acquainted with that property?

A. Something over 20 years.

Q. What would you say would be the market value of that property in the months of June and July, 1886?

Objected to because the witness has not shown himself competent to testify to the market value of this particular tract of land.

Q. Well, before you answer the question, I would ask you if you knew the market value of this particular piece of property in June and July, 1886.

A. Yes, sir; I think I did.

Q. What was the market value of it in the months of June and July, 1886, as an entirety, taking the tract together?

A. I should consider it worth seven hundred and fifty dollars an acre.

Cross-examination—questions by Mr. QUINTON:

Q. When did you say you sold out your business, Mr. Jewell?

A. About the last of March last.

Q. 1887?

A. Yes, sir.

Q. When you were employed in the bank were you not actively engaged in attending to the banking business every day?

A. I was actively engaged in the bank.

Q. Did you seek to purchase this land during the months of June and July, 1886?

A. I did not.

Q. Did anybody seek to purchase it of you or talk to you of purchasing it at that time, that you remember of?

A. I heard talk about its being sold at that time.

Q. Is it not a fact, Mr. Jewell, that it was a considerable
199 length of time after June and July that you heard it talked about being sold, as a matter of fact?

A. I don't recollect the exact date that I heard of it being sold.

Q. Do you remember of having your attention called to it or being spoken to about this tract of land until you heard of its being sold during that period?

A. I never heard any price put upon it until I heard it was sold.

Q. Your attention, then, was not particularly called to this tract of land until you heard it was sold, was it?

A. Not especially.

Q. You do not pretend to say, do you, Mr. Jewell, from your own positive knowledge, that this tract of land could not have been sold for a great deal more money than what you heard it sold for in the months of June and July?

A. No; I don't know what it could have been sold for.

Q. Then when you put this price upon the tract of land that you have spoken of you do not base that entirely, do you, Mr. Jewell, upon what you knew it could have been sold for if put upon the market during the months of June and July, 1886?

A. What it could have been sold for?

Q. The price, then, that you put upon this tract of land, Mr. Jewell, is the price you think it was worth yourself, aside from anything that you know what it may have been sold for or could have been sold for during those two months of June and July, 1886, is it not?

A. I don't know what it could have been sold for; I don't know anything about that.

Q. Was your attention called to any tract of land similar to this in size and location to the city of Topeka during the
200 months of June and July, 1886?

A. I don't know that it was specially.

Q. I will ask you if you know, Mr. Jewell, what lots were selling for along about that time in Williams & Dillon's addition to the city of Topeka.

A. I don't know anything about any lots having been sold of a similar size.

Q. Well, lots—I am speaking now—I mean of any subdivision of Williams & Dillon's addition.

A. I only know what I heard it talked of their being sold at. I did not buy any and had no occasion to see any one. I don't know that I saw any papers drawn up indicating what they were sold for, but I heard the street talk about what they were selling for.

Q. What were you informed from that that they were selling for, Mr. Jewell?

Objected to because it is incompetent, irrelevant, and immaterial.

A. My recollection is that they were selling for about $200 apiece—lots 25 feet front.

Q. There is about eight lots to the acre, is there not, besides the streets and alleys, in a subdivision—lots of twenty-five feet front?

A. That depends entirely upon the depth of the lots. I do not know the size of Williams and Dillon's lots, but I judge there are seven or eight to the acre, from what I have seen of them.

Q. They are usually twenty-five by one hundred and fifty feet, are they not?

A. No, sir; not in the additions now being laid off—that is, as I understand it from the talk.

Q. About what is the depth of a lot which has a front of 25 feet?

201 A. I think they more commonly run from one hundred and twenty-five feet deep to one hundred and forty feet deep. That is my understanding of it.

Q. Is it not a matter of fact, Mr. Jewell, that this Williams & Dillon addition is about the same distance from the center of the city here as the Keith tract—the center of the business portion of the city?

A. I should think Williams & Dillon's was a little closer, taking the densely populated part of the city, though I could not say certainly.

Q. I mean the business part, from the business or the business part of the city.

A. I should judge that the Williams & Dillon tract was a little closer to the business portion of the city.

Q. What did you think the value of lots in Williams & Dillon's addition was at that time, Mr. Jewell, in June and July, 1886?

A. About two hundred dollars apiece, I should judge.

Q. Were you informed as to how lots were selling in Martin & Dennis's addition along at that time?

A. Oh, I heard the talk about their being sold there.

Q. What did you think, Mr. Jewell, was the market value of lots in Martin & Dennis's addition along at that time?

A. I should consider them about the same price as I would in Williams & Dillon's.

Q. Is it not a fact, Mr. Jewell, that there was no land or property immediately adjoining Martin & Dennis's addition that had been laid out and built upon at that time?

A. There had been some immediately adjoining that that had been sold in small tracts—in acre tracts.

Q. There had been no land platted?

A. Yes, sir; there had—that is, in that vicinity beyond.

202 Q. Adjoining Martin & Dennis's addition and built up at that time, had there?

A. Yes, sir; a little further beyond, west, there had been some platted and sold in lots. They were twenty-five feet front and, I think, one hundred and twenty-five or thirty feet deep, but I will not be certain about it; it was just a little beyond and west.

Q. That was out in the Washburne College addition, was it not?

A. I was thinking of the Bartholomew tract; I had that in

mind. I know now—it occurred to me when I said Martin & Dennis—that it was the Bartholomew tract.

Q. Then the land immediately adjoining the Martin & Dennis tract had not been platted and built upon as residence property at that time, had it?

A. Why, I should say that some of it had—that immediately north; there were houses there—several, I think—right across the road; Hutchinson had a small tract adjoining it on the north and a house on it, and I think there were several other houses close by it.

Q. Is it not your understanding that the land had not been platted and laid out into city lots right there adjoining it?

A. I never heard of its being platted; I had heard of small pieces being sold there.

Q. Small pieces sold by the acre, were they not?

A. I think so.

Q. As to the location of the Martin & Dennis addition to the city of Topeka, is it not a fact that the Keith tract of land is near- to the center of business than the Martin & Dennis tract of land is?

A. I judge not—that is, I judge the Keith tract is not nearer to the center of business than the Martin & Dennis addition.

203 Q. Is not the Keith tract of land nearer to the corner of Sixth street and Kansas avenue than the Martin & Dennis addition is?

A. I would not think it was, but I don't know. It is not very far from Kansas avenue, I know that—from the extension of Kansas avenue.

Q. Is it not a fact that the Keith tract of land is nearer to the business part of the city than the Martin & Dennis addition?

A. I could not say.

Q. Would you say that they were about the same distance?

A. I would not think that there was a great deal of difference.

Q. Is it not a fact that the south end of the Keith tract of land is just two blocks north of the Sixth-street car line?

A. I judge it is about two blocks, but I do not know certainly.

Q. Don't you know that the Keith tract of land—that the west end of it—is just seven blocks from Kansas avenue?

A. I don't know how far it is.

Q. And that the east side of it is about five blocks from Kansas avenue?

A. I do not know that. I could not count up the blocks very well without passing by them.

Q. Is it not a fact that the Martin & Dennis addition is six blocks south of the 10th-street car line?

A. I didn't know that it was. I don't know the exact distance.

Q. Don't you remember now, Mr. Jewell, that the north end of the Martin & Dennis addition is on 16th street?

A. I don't know what street it is on by name. I know very well——

Q. What is your recollection about it now? Don't you

204 recollect its being about that street?

A. The street is called Euclid avenue. I never heard it named by number before.

Q. If Euclid avenue, then, is 16th street the nearest portion then of Martin & Dennis's addition to the city is 16th street, is it not?

A. I don't know anything about whether it is 16th street or not. I don't know that it is not.

Q. I said if it was Euclid avenue, if 16th street was Euclid avenue, then the nearest portion of Martin & Dennis's addition to the city of Topeka is 16th street?

A. I understand that the north side is on Euclid avenue. I never had my attention called to it and had no knowledge whatever about the number of the streets.

Q. If the Martin & Dennis addition, the north end of it or the part nearest the city of Topeka, is on 16th street it is about ten blocks from the center of the business portion of the city, is it not, Mr. Jewell?

A. I don't know how many blocks there is between——

Q. Well, would you consider Sixth street the center portion of the business part of the city?

A. Well, do you include North Topeka?

Q. No.

A. I should think it would be about 7th street where the business now seems to be located.

Q. Is it not a fact that in Martin & Dennis's addition some parts of it is very low and cut up with ditches that run down toward the Shunguanungua creek?

A. There is one ravine that runs through it that I recollect of—quite considerable of a ravine.

205 The further taking of this testimony was here adjourned until one o'clock p. m. of this day, to meet at the same place.

LESTER S. WILSON, *Examiner.*

Parties met pursuant to adjournment.

Present as in the forenoon session, and the following proceedings were had:

J. B. BARTHOLOMEW, a witness on behalf of the defendants, being by me first carefully examined, cautioned, and solemnly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

Direct examination—questions by Mr. SMITH:

Q. Are you the same J. B. Bartholomew that was introduced as a witness on behalf of the complainant in the early part of the taking of this testimony?

A. I believe I was here then.

Q. During the year 1886 did you have any correspondence with the complainant?

A. I see by my letter book that I wrote to him on the 26th of June, 1886.

Q. Have you the original letter that you wrote at that time?
A. I have a copy.
Q. Then you have not the original letter?
A. No; we sent him the original; we kept a press copy.
Q. Are you in the habit of preserving copies of your business letters?
A. Yes, sir; we intend to copy everything that goes out.
Q. How are they preserved?
A. In book form.
Q. How are impressions made—by letter press?
A. By letter press; yes, sir.
206 Q. Have you the book containing a copy of this letter that you have referred to?
A. I have.
Q. Will you turn to it?
A. Yes, sir.
Q. What page does the copy appear on?
A. Page 250.
Q. Over what period of time does that letter book extend?
A. This extends from May 12th to October 7th, 1886.
Q. Have you any objections to detaching this copy of this letter from your letter book?
A. I would rather give you a copy.
Q. You would prefer, then, to retain the copy that you have?
A. Yes, sir; I would prefer to keep it intact.
Q. If you will allow us to tear out this letter-press copy of this letter and use it in testimony we will assure you that it will be returned on the disposition of the case.
A. I don't know that I would have any objections to that, only I supposed that a copy of it in your notes would be just the same.

The page containing the impression of the letter referred to is thereupon detached from the letter book, and such impression is here offered in evidence, and the same is hereto attached to the witness's deposition as Exhibit J of defendants' testimony and made a part hereof.

To which the complainant objects because no proper foundation has been laid for the introduction of the copy, and we object to its statements on the ground that they are hearsay and a repetition of an alleged conversation with other parties.

Q. Was the original of which this is a letter-press copy deposited in the United States mails in an envelope addressed to the
207 complainant and postage prepaid?
A. I presume so; my stenographer looks after that. When I dictate a letter he writes it out and he is supposed to mail it.

The complainant still objects to the letter as evidence for the reasons stated in the previous objections.

J. B. BARTHOLOMEW.

The further taking of this testimony was here adjourned until November 8th, 1887, at three o'clock p. m., at the same place.

LESTER S. WILSON, *Examiner.*

Parties met pursuant to adjournment.
Present as before, and the following proceedings were had:

208 JOHN W. DAY, a witness on behalf of the defendants, being by me first carefully examined, cautioned, and solemnly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

Direct examination—questions by Mr. SMITH:

Q. What is your name, age, place of residence, and occupation?
A. John W. Day; residence, Topeka, Kansas. I am 54 years of age; occupation, attorney.
Q. How long have you lived in Topeka?
A. About 12 years.
Q. Whereabouts in Topeka do you now live?
A. I live just out of the city limits, in what is called Potwin place.
Q. Where is that situated relative to the piece of land commonly called the Keith tract?
A. The tract that was laid off by Mr. Potwin and called the Potwin place lies adjoining and west of the Keith land.
Q. When did you first take up your residence in Potwin place?
A. On the 23rd of December, 1885.
Q. Were you acquainted with the values of real estate in Topeka and its vicinity during the months of June and July, 1886?
A. I know something of them—of some of the values.
Q. Were you acquainted with the market values of property in Topeka and the vicinity of Topeka during those months?
A. I think I was, though I was not engaged in real-estate purchases or speculations nor sales.
Q. Do you know the piece of land comprising 86 and ½ acres commonly called the Keith tract which lies east of the Potwin place?
A. Yes, sir; I do.
209 Q. Do you know its value—its market value—in the months of June and July, 1886, taken as an entirety?
A. I think I know what it was worth.
Q. What would you say the market value of this piece of property was in the months of June and July, 1886?
A. Well, I should say it was worth about eight hundred dollars an acre.

Cross-examination—questions by Mr. QUINTON:

Q. You say you purchased in Potwin place in December, 1885?
A. Yes, sir.
Q. How much land or ground did you purchase there at that time?
A. I should think about seven-eighths of an acre.
Q. What did you pay for it at that time?
A. One thousand dollars.

Q. Is it not a fact that the Keith tract of land lies immediately east of Potwin place and between Potwin place and the city?

A. Yes, sir—no; it does not. It lies immediately east of it, but not between that and the city; it lies north of the city.

Q. Don't you have to pass by the Keith tract of land to get to Potwin place in coming from the city?

A. You pass by it—yes, sir; but the city limits——

Q. Does not the Keith tract of land, then, lie between the Potwin place and the city—not the city limits, but the city?

A. No; I don't think it does. It lies between the Potwin place and the Ward farm, which is partly laid off, but not a part of the city.

Q. Is it not a fact that the Keith tract of land is nearer the center portion of the business part of the city than the Potwin place?

210 A. Yes, sir.

Q. In coming, then, from the business part of the city to Potwin place you have to pass by the Keith tract of land, do you not?

A. Yes, sir.

Q. Did you seek to purchase or was anything said to you about purchasing that tract of land in the months of June and July, 1886?

A. I don't remember that there was just at that time. There was a time before that——

Q. That is not what I am asking you. You would not say, would you, from your own positive knowledge, that that land could not have been sold on the market in the months of June and July for any more money than you have named?

A. No; I would not say that.

Q. What you have testified then as to the value of that land is your own opinion of it outside of what it might have sold for on the market at that time, from anything that you know?

A. No, sir; not wholly so. I heard it variously estimated——

Q. If, as a matter of fact, parties in the city sought to purchase that tract of land during those two months at a much greater figure than the one you have named, you do not know what the market value of the land was at that time, would you? You do not know what the market value of the land might have been at that time, do you?

A. Well, I don't know what you mean by that. I do not understand the market value of any property to be what any particular individual at a special time would offer for it or give for it, not knowing what his reasons for doing so would be. A man might offer for one particular piece of land considerable more than its market value, for some reason or other, because he might want it.

That land may have been worth one or two hundred dollars

211 an acre more than I have suggested—possibly from eight hundred to a thousand dollars—but I think a thousand dollars at that time would be an extreme price for it.

Q. Did you get that opinion from any prices or any offers you know of being made at that time?

A. From estimates that I heard made from time to time by different parties in relation to its value.

Q. I am asking you if you get that opinion from any prices or any offers you know of being made during the months of June and July, 1886?

A. I don't know what offers were made for it personally. I heard statements of what offers would be made or would be given for it or perhaps were made.

Q. How do you fix the dates of June and July for those statements?

A. I don't know that I would confine it especially to those two months.

Q. Then what you have testified to has not been your judgment for those two months alone?

A. Yes, sir.

Q. When were you first spoken to about testifying in regard to this case?

A. Never until this afternoon or about noon.

Q. I believe you stated that your attention was not particularly called to that tract of land during the months of June and July, 1886?

A. I don't know but it was. I did not say that.

Q. Do you know that it was?

A. Not positively; but along about that time and before.

Q. How often have you had your attention called to it since that time, if at all, until to-day?

212 A. Well, I don't know; I have seen newspaper comments on it, and I have heard people talking about the land, and about the hope that it might be laid off into lots and brought into market.

Q. That is not an answer to my question.

A. I think it is.

Q. I asked you how many times your attention had been called to it?

A. In what particular, then? If you will be more definite I will be.

Q. Did you purchase any land in 1886, in or near Topeka?

A. No, sir.

Q. Did you sell any?

A. No, sir.

Q. You were not in the business of buying and selling land?

A. No, sir.

Q. Your attention was given almost wholly to legal matters, was it not, in a business line?

A. Principally so; that was my business; yes, sir.

Q. You were among the first to remove to Potwin place, were you not?

A. The first; yes, sir.

Q. Now, after December, 1885, when you removed there, was there not a constant increase in the appreciation by people who wanted

homes a little out from the crowded part of the city, in that addition and the neighborhood, as places for residence?

A. My recollection about that is that prices of the lots in Potwin place were not advanced until the next spring.

Q. That is, that the prices were not advanced by Mr. Potwin?

A. Yes, sir.

Q. Until the spring of 1886?

A. Yes, sir.

213 Q. But in the meantime a great many persons had purchased there, had they not?

A. Yes, sir.

Q. And purchased there with the condition that they would build houses costing not less than two thousand dollars, within six months?

A. Yes, sir.

Q. And early in the spring of 1886 a great many had commenced to build there, had they not?

A. Yes, sir.

Q. By that time, by March or April, 1886, had not the prices of lots in Potwin place which had been sold to individuals been advanced by them?

A. I presume they were; but I do not know of any one that had purchased that wanted to sell. I do not know that there were any prices put upon them.

Q. About what time did Mr. Potwin advance the prices upon his lots?

A. Well, I do not remember exactly about that, but I think it was somewhere about April, 1886.

Q. Now, after that, and during the months of April and May and June and July, were there not so many nice residences commenced there by people who would be considered desirable neighbors that the values had greatly advanced by August, 1886?

A. Yes, sir; the values of lots had advanced.

Q. And have they not continually advanced since that time, Judge?

A. Yes, sir.

Q. Until now, according to your best understanding, what is the value of desirable lots there, or the price asked?

A. From two thousand to three thousand dollars.

214 Q. For lots not exceeding seven-eighths of an acre?

A. Yes, sir; about seven-eighths of an acre.

Q. And that seven-eighths of an acre includes streets and alleys, does it not—a half of the street and a half of the alley which bounds the lots?

A. Yes, sir.

Q. Now, during the month of May there was an increase in market values, was there not—that is, in the salability of these lots?

A. I should think there was some little increase from month to month.

Q. And would you not think there was also an increase in June, 1886, during the entire month?

A. I think so. I say from month to month after, say, April, 1886; maybe a little earlier than that.

Q. And during the month of July there was also an increase?

A. Yes, sir.

Q. And during the month of August?

A. Yes, sir.

Q. Now, this Potwin place adjoins directly the Keith land for a half mile, does it not?

A. Yes, sir; nearly that.

Q. And would not the same reasons, of the building of good houses and the commencement of the building of good houses and good neighbors going out there in the immediate vicinity and adjoining the Keith tract, also increase the market value of the Keith tract?

A. It would slightly, but not so much as that tract itself. The increase from month to month, in the time that you are speaking about now, was not nearly so great as it was afterwards.

Q. Now, as to many of the houses, they were on ground
215 not more than two hundred feet from the Keith tract, were they not?

A. Yes, sir; those fronting west on Greenwood avenue are within less than 200 feet of the west line of the Keith tract.

Q. How far is Greenwood avenue from the Keith tract?

A. About 230 feet; maybe it may not be quite as much as that.

Q. During the spring and summer of 1886 the principal building in Potwin place was upon this Greenwood avenue, was it not?

A. On the west side of it; yes, sir.

Q. There was some on the east side, was there not?

A. Two, possibly three, houses.

Q. And more since that time?

A. Yes, sir—no; there were not over two since 1886.

Q. Now, would you say that the value of the Keith tract was the same in the month of April as in the month of August, 1886?

A. Not quite so much.

Q. In your opinion, the value would be greater in July and August than April, 1886?

A. Yes, sir.

Q. In your opinion, would the value have been greater in August, 1886, than in June, 1886?

A. I think that perhaps there had been a slight advance in its value.

Q. How much of the ground on the east side of the Keith tract extending northward has been platted—I wish to ask how far the ground from the southeast corner of the Keith tract has been platted?

A. Northward of the Keith tract?

Q. Lying east of the Keith tract.

A. I should think a distance of nearly half, or quite.

Q. Do you know the location of the school-house adjoining the Keith tract on the east?

216 A. Yes, sir.

Q. Did you have information as to the time when that acre was purchased for school purposes?

A. No, sir.

Q. Or the price paid for it?

A. No, sir.

Q. During the early part of the summer of 1886 and in the spring were there not buildings and an activity in the sale of lots along the east side of the Keith tract?

A. There was, on Clay street, what is called the extension of Clay street; I know of none west of that.

Q. Do the lots fronting on Clay street extend near to the Keith tract?

A. At the south end, southeast corner, of the Keith tract it is within about, perhaps, a little less than half a block from the west end of the lots on Clay street, but the distance between the two widens as you go north.

Q. Then, were there not also in the little triangle or wedge still west of Clay street buildings erected in the spring of 1886, immediately adjoining the Keith tract?

A. There may have been, but I do not recollect any now. I know of some that have been erected this year, but I do not know whether it would run back into last year or not.

Q. Now, since your attention has been particularly called to the increase in values, what would you say the Keith tract was worth per acre in the month of May, 1886?

A. I don't think that I would put it higher than I put it in the first place, $800.

Q. What would you think its market value to have been in August, 1886—in the first half of the month of August, 1886?

A. Well, perhaps one thousand dollars, and I think that
217 would be a pretty rapid increase for that length of time.

Q. The ground was fairly built up along the south end of the Keith tract, was it not, Judge? It was considered a fair residence part of the city?

A. Yes, sir; adjoining it there were then about three or four or five houses, maybe more, across the south end of it; some of those were very inferior shanties; we will not include those; there were some houses there.

Q. But 4th street runs near to the Keith tract for some distance, does it not?

A. It ends at the southeast corner or very near the southeast corner of the Keith tract, the west end of 4th street.

Q. And does 5th street run about to the southwest corner of the Keith tract, a little south of it?

A. It don't touch it; no, sir.

Q. Well, 5th street there is very fairly built up with residences, is it not, south of the Keith tract?

A. Yes, sir; more so on the south side of it than on the north.

JOHN W. DAY.

218 JOHN BRIER, a witness on behalf of the defendants, being by me first carefully examined, cautioned, and solemnly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

Direct examination—questions by Mr. SMITH:

Q. What is your name, age, place of residence, and occupation?

A. John Brier; residence, Topeka, Kansas; age, 61 years; occupation, loan agent.

Q. How long have you resided in the city of Topeka?

A. Since the spring of 1868; 19 years ago last April.

Q. How long have you been engaged in the loan business here?

A. I have been connected with it about twelve or thirteen years.

Q. What particular part of the loan business have you had charge of?

A. The examination of real-estate securities principally until the last five or six years.

Q. In conducting this loan business have you become acquainted with the values of real estate in Topeka and its vicinity?

A. I have kept the run of it pretty well, I guess, sir,

Q. Were you acquainted with the market values of property in Topeka and its vicinity in the months of June and July, 1886?

A. Yes, sir; I believe I was pretty well acquainted; I thought I was.

Q. Do you know of a piece of property comprising 86 and ½ acres, commonly called the Keith tract, lying to the northwest of the city?

A. Yes, sir.

Q. Were you acquainted with its market value during the
219 months of June and July, 1886?

A. Well, I thought I was. The question was asked me what it was worth at the time it was sold. I don't remember how the conversation came up. Mr. Fox was telling me that the property was sold and was speaking about the high price of property.

Q. Was your attention directed to this piece of property during the summer of 1886?

A. Yes, sir; when it was sold.

Q. What would you say would be the market value of this property in an entirety in the months of June and July, 1886?

A. I thought it was well sold when it was sold.

Q. By saying it was well sold do you mean it was sold for what it was worth?

A. For all it was worth; yes, sir. That is what I thought at the time.

Q. What sale do you refer to?

A. To the sale, as I understood it, to Mr. Holliday and Mr. Kellam.

JOHN BRIER.

220 H. C. LINDSAY, a witness on behalf of the defendants, being by me first carefully examined, cautioned, and solemnly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

Direct examination—questions by Mr. SMITH:

Q. What is your name, age, place of residence, and occupation?

A. H. C. Lindsay; age, 43 years; residence, Topeka, Kansas. I am not doing much of anything now. I have been in the livery business for years here.

Q. How long have you lived in the city of Topeka?

A. I came here 30 years ago Sept. 17th.

Q. What official position have you occupied in official affairs of Shawnee county during the past six or eight years?

A. I have been county commissioner.

Q. Are you acquainted with the market value of real estate in Topeka and its vicinity during the months of June and July, 1886?

A. Why, I don't know as I am a good judge of what real estate is worth, Mr. Smith. I am sure I don't know. I have my opinions, and that is all. I have never been in the business and do not know as I would be a good judge of it.

Q. What are your opinions based upon?

A. Well, I have known of the lands around here a good deal and seen it at different stages, and of course a man has an opinion of what anything is worth, its proximity to the city, and so on.

Q. Is that opinion based upon business transactions that you have had and been familiar with?

A. Well, of course, being a county commissioner, we have to meet as an equalization board every year, and then we express our opinions as to what property is worth. We have to in order
221 to equalize it and fix it up. There are three of us, and one has one opinion and one another.

Q. Well, from the knowledge that you have derived from your business experience, and also the knowledge that you derived from being a member of the board of equalization and one of the county commissioners of Shawnee county, do you think you knew the market value of land in the vicinity of Topeka during the months of June and July, 1886?

A. Well, I don't know as I do. As I said before, I could say what I thought it was worth, and that is about all. I don't know as I could say what it was worth.

Q. Your opinion as to what property is worth is based upon the knowledge that you have acquired by occupying these positions?

A. Yes, sir.

Q. Do you know the piece of property commonly called the Keith tract, lying northwest of the city?

A. Yes, sir; I have known it for years.

Q. I do not ask you if you positively knew the value of lands in the months of June and July, 1886, in the vicinity of Topeka, but do you think you knew the value of it?

A. Well, I might say yes to that.

Q. What, in your opinion, would be the market value of this Keith tract of land in the months of June and July, 1886, taking it as an entirety?

Objected to because the witness is not shown to have a knowledge of the value of the land.

A. Well, sir, my opinion was that that land was worth from $60,000 to $75,000. I know that a conversation came up about it on the board——

Mr. SMITH: That would not be competent.

Cross-examination—questions by Mr. QUINTON:

222 Q. From what you know of lands in that vicinity, Mr. Lindsay, there was a rapid increase or an increase in the value of lands from early in the spring of 1886, was there not, all through that year?

A. In 1886?

Q. Yes, sir; an increase.

A. Well, I should think there was, but still not so much as there has been in 1887.

Q. Potwin place was built up on the west of that in 1886?

A. Yes, sir.

Q. As you were sitting as a board of county commissioners you valued the property along about the first of March, 1886, did you not?

A. Yes, sir; I think it was 1886 the last real-estate assessment was made that we had.

Q. Property increased along there in value each month, did it not?

A. Certainly, each year; yes, sir.

Q. This estimate that you have given, then, is from the consideration that was given to the land when you valued it about the first of March, wasn't it?

A. 1886?

Q. Yes.

A. Yes, sir.

Q. About how much, then, would you say that the land had increased in value, this Keith tract of land, by the first of August, 1886, upon the valuation you put upon it the first of March?

A. From the first of March, 1886?

Q. Yes, sir; per acre.

A. I do not know hardly; we take the increase from year to year, you know. For instance, this land in 1884——

223 Q. I do not care anything about that, Mr. Lindsay. I asked you if the land did not increase in value along there.

A. I suppose it did. Of course it was worth more in the spring of 1887 than it was the spring of 1886, and more in the spring of 1886 than it was in the spring of 1885.

Q. I asked you about what it had increased to the first of

August, 1886, from the first of March, when you put this valuation upon it.

A. Perhaps it had increased—I don't know; perhaps $25 or $30 per acre; maybe more. Of course I could not tell about that, because we take our——

Q. What would you think, then, Mr. Lindsay, that it was worth per acre, its market value, on the first of August, 1886?

A. Well, sir, I should think perhaps in the neighborhood of $700 or $750. There is some of Mr. Keith's land that is worth more than the rest of it, but you go to purchase it and probably some of it was worth a thousand dollars an acre; then there was some that probably was not worth near as much.

224 H. A. PIERCE, a witness on behalf of the defendants, being by me first carefully examined, cautioned, and solemnly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

Direct examination—questions by Mr. SMITH:

Q. What is your name, age, place of residence, and occupation?

A. H. A. Pierce; age, 50 years; I reside in Topeka, Kansas; I am engaged in real estate, and a lawyer.

Q. How long have you been engaged in real estate?

A. Two years in the city of Topeka.

Q. How long have you lived in Topeka and its vicinity?

A. Two years.

Q. Are you acquainted with the values of real estate in Topeka and its vicinity?

A. I think I am.

Q. In the months of June and July, 1886?

A. Well, yes, sir; I think I was pretty well acquainted with the values of real estate during the whole of 1886.

Q. Where had you lived prior to coming to Topeka?

A. At Alma, in Wabaunsee county, for seven years.

Q. How far is that from Topeka?

A. About 35 miles.

Q. Were you frequently in Topeka prior to that time?

A. Yes, sir; very frequently. I owned some property in Topeka before I came here.

Q. You had interests that called you to Topeka very frequently?

A. Yes, sir; I also was a member of the bar of the court here, and frequently had business here.

Q. Do you know a piece of property commonly called the
225 Keith tract, comprising 86 and ½ acres of land, lying to the northwest of the city?

A. I do.

Q. Are you acquainted with its market value for the months of June and July, 1886?

A. I think I can form a reasonably fair estimate of its value then.

Q. What would you say was its market value during June and July, 1886?

A. Taking the whole tract or per acre?
Q. The whole tract as an entirety.
A. Well, I should say anywhere from sixty to seventy-five thousand dollars; say about $800 per acre.

H. A. PIERCE.

The further taking of this testimony was here adjourned until Friday, November 11th, 1887, at 2 o'clock p. m.

LESTER S. WILSON, *Examiner.*

Parties met pursuant to adjournment.
Present as before, and the following proceedings were had:

226 JOAB MULVANE, a witness on behalf of the defendants, being by me first carefully examined, cautioned, and solemnly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

Direct examination—questions by Mr. SMITH:

Q. What is your name, age, residence, and occupation?
A. Joab Mulvane. I reside in Topeka, Kansas. I am railroading—president of the Chicago, Kansas and Western railroad.
Q. How long have you lived in the city of Topeka?
A. Ten years last May.
Q. What has been your occupation during the principal time of your residence in Topeka?
A. Investments of one kind and another—stocks and lands and cattle.
Q. Have you made miscellaneous investments in real estate in that time in Topeka and its vicinity?
A. Yes, sir.
Q. Are you acquainted with the market value of real estate lying adjacent to the city of Topeka and in the city of Topeka during the months of June and July, 1886?
A. To a fair degree I think so.
Q. Are you familiar with the piece of property commonly called the Keith tract, consisting of 86 and ½ acres, lying to the northwest of the city?
A. I know the tract of land.
Q. Are you acquainted with its market value in the months of June and July, 1886, in an entirety?
A. In a general way.
Q. What, in your opinion, would be a fair market value of this property, taking it in one entire piece, during the months of June and July, 1886?

227 A. Well, I noticed the sale of that land at the time it was sold, and my recollection was that the price was in the neighborhood of $800 per acre, and the impression upon my mind at the time was that it was a good sale; that I would not care to have given any more for it.

Q. You think that was the fair market value of the property at that time, do you?

A. I think so; that was my impression.

Cross-examination—questions by Mr. QUINTON:

Q. Mr. Mulvane, what do you understand to be the market value of a piece of land?

A. About what it will bring or transactions are being made at in property of that character at the time. That seems to be the general method of determining the value, about what such things will bring or other pieces similar.

Q. At this particular time of June and July did you yourself buy or sell any tract of land similar in size and location to the city of Topeka?

A. No, sir.

Q. As far as your own knowledge is concerned, Mr. Mulvane, do you know as a matter of fact that this land could not have been sold for a great deal more money during those two months?

A. I don't know that.

Q. Is it not possible, Mr. Mulvane, from what you know yourself, for it to have been sold in those two months for a great deal more money than that?

A. I can't say as to that. I don't know whether it could or not.

Q. You were not actively engaged in buying and selling property at that time, were you?

228 A. Not particularly so; I owned some property in the city.

Q. You, then, form your estimate of this land, as many others would do, from your general knowledge of what property is worth around Topeka, don't you?

A. Yes, sir.

Q. Has your attention been called to the value of this land during those two months of June and July, 1886?

A. Only in a general way, observing the values over the city and adjacent to it.

Q. Was your attention particularly called to this tract of land during the two months of June and July with the idea or purchasing it or selling it?

A. No, sir.

Q. No one had spoken to you about buying it or taking part in buying it at that time?

A. No, sir.

Q. Did you know of any one trying to buy or seeking to buy it during those two months?

A. No, sir; I did not.

Q. Do you know of the fact that an acre of land adjoining this Keith tract of land immediately on the east was sold for the purposes of a school-house about that time for one thousand dollars?

A. I may have known of it at the time, but I don't recollect it now.

Q. Do you know what land was selling for in Potwin place at that time, immediately adjoining this Keith tract on the west?

A. In lots?

Q. Yes, sir; in ⅛ of an acre lots.

A. Yes, sir; I know about what they were holding them at—selling them at.

229 Q. Do you know of any sales that were made at that time in Potwin place?

A. No, sir; not definitely. I knew of various parties who were buying and locating there, but I can't name any particular one at that time.

Q. Potwin place along about that time and prior was building up very rapidly, was it not?

A. I think there was considerable building going on there about that time.

Q. They commenced building, is it not a fact, in Potwin place along in the fall of 1885?

A. I can't name the date.

Q. When Judge —— purchased a place out there and commenced building?

A. I should think it was about that time, but, as a matter of fact, I don't know just when they did commence.

Q. I will ask you if it is not a fact if property in Potwin place did not increase considerably in value in the spring of 1886 after they opened up to building in the fall of 1885.

A. I don't know anything in particular as to that locality.

Q. Do you know what land was selling for in lots immediately south of and adjoining the Keith tract of land during those two months of June and July?

A. I can't say as to any particular lots.

Q. Is it not a fact, Mr. Mulvane, that the estimate that you put upon the value of this land is founded more upon what you yourself would consider it worth if you had been purchasing it or if you had been having an interest in it?

A. It is founded upon a general idea of values over the city and upon what the impression made upon my mind at the time as to whether I would be willing to have paid any more for it; that is about the way.

230 Q. Is it not a fact that this impression comes somewhat from what you would have felt like paying for it yourself if you were to have an interest in it?

A. Yes, sir; in a measure.

Q. I will ask you, Mr. Mulvane, if there was not a gradual increase in the values of property all over the city, and especially out in that direction towards Potwin place, along in the spring of 1886.

A. Well, there has been a gradual increase; I cannot name as to when particularly it begun.

Q. Well, from that time—since that time?

A. Yes, sir; since that time I think there has been almost a constant increase in property.

Q. When was your attention first called to this Keith tract of land during the year 1886?

A. You mean the sale of it?

Q. No, sir; in any manner, if called at all.

A. I have known the tract ever since I have been here, as a tract.

Q. I was asking you to find out whether or not your attention had been called to that tract of land during the year 1886—when first it was.

A. Nothing outside of the fact that I knew the tract, and when the sale occurred, of course I noticed the sale.

Q. What did you consider that tract of land worth in the month of March, 1886?

A. Well, my mind was not called to the tract of land except by the sale.

Q. Then, as a matter of fact, you had not thought much about it for long prior to the time you heard of its sale?

231 A. Nothing; only a general idea of the values of property.

Q. What was your general idea of its value in April, 1886?

A. I could not say as to that, because I don't know as I thought of it in April, 1886.

Q. Nor in May, nor in June, nor in fact no time prior to the time that you heard of the sale?

A. No, sir; I simply knew of it in a general way.

JOAB MULVANE.

232 ALLEN SELLS, a witness on behalf of the defendants, being by me first carefully examined, cautioned, and solemnly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

Direct examination—questions by Mr. SMITH:

Q. What is your name, age, place of residence, and occupation?

A. Allen Sells; I am 51 years of age. It is pretty hard to tell what I am engaged in—trading, trafficking—buying and selling anything I can.

Q. Where do you reside?

A. I live in Topeka, Kansas.

Q. How long have you lived in Topeka?

A. Five years the 24th of next December I came here to live.

Q. Are you the owner of a considerable quantity of real estate in the city of Topeka and its vicinity?

A. Yes, sir; I own some land.

Q. Have you dealt in real estate, in connection with other matters, during your residence here?

A. Yes, sir.

Q. Are you acquainted with the market values of real estate in the vicinity of Topeka and in Topeka during the months of June and July, 1886?

A. Well, some little.

Q. Do you know a piece of property commonly called the Keith tract, consisting of 86 and ½ acres, lying northwest of the city?

A. Yes, sir; I have looked at it, seen it, and know it.

Q. Were you acquainted with the market value of this tract in the months of June and July, 1886, taking the entire tract as one piece?

233 A. Not very much; I was not very well acquainted with it.

Q. Do you think that you were acquainted with the market value of it at that time?

A. Well, it was on the wrong side of the town. I had not traded much out in that direction, Mr. Smith; I had not traded much in that part of the town.

Q. Still, you had been a large property-owner of property lying adjacent to Topeka, had you not?

A. Yes, sir.

Q. And also a large owner of property in Topeka?

A. Yes, sir.

Q. And you had what you consider a general knowledge of the value of property in Topeka and its vicinity?

A. I thought I had some; yes, sir.

Q. Well, from such knowledge and information, what would you state the value of this Keith tract to be in the months of June and July, 1886?

Objected to because it is not shown that the witness was acquainted with the market value of this tract of land at that time nor at any time.

A. Well, I thought it was a pretty fair price for it. I had not bought any nor had not got any out that way; but when I noticed the sale—all the information I had is what I saw in the papers—I thought it was a pretty fair sale; I thought it was a pretty fair price for it.

Q. Do you refer to the price of $60,000, which was paid for this tract?

A. Yes, sir; I thought the transfer was $60,000, and I thought it was a pretty fair price for it.

Q. In your opinion, you think that $60,000 would be a

234 fair market value for that property at that time?

A. I thought it was at the time. I had a little experience that needs a little explanation—that is, Euclid park place and south of Euclid park place, considering the way that sold, I thought it was a fair price; that there was really no reason for it to be so much more valuable than Martin & Dennis's addition and other places that I had investigated.

Cross-examination—questions by Mr. QUINTON:

Q. When you say you thought there was no reason for its being so much more valuable than the Martin & Dennis addition you refer to Euclid park, don't you?

A. Yes, sir; and that property about there.

Q. Your attention was not particularly called to this Keith tract of land during the months of June and July, 1886, was it?

A. Only through the sale that was there recorded.

Q. Is it not a fact, Mr. Sells, from the value that you think now or that you have stated here that you placed upon this land, is it not derived from your recollection now as you look back and not from any opinion or knowledge that you had at that time?

A. Well, I don't understand you, Mr. Quinton, how you want——

Q. I will ask you again: Is it not a fact that the value that you place upon this tract of land is arrived at by you by recollecting back now and trying to remember what property was worth at that time and not from any particular value that you had in your judgment or your knowledge of the values or property around Topeka at that time?

A. Well, I have been watching property considerably around Topeka, and I found pieces of property that were equally as eligible and that I thought were just as good and that could be bought at that time for less money that, in my judgment, I thought was just as good land, and I had no other knowledge, only just from
235 trying to buy property about Topeka.

Q. Is it not a fact, Mr. Sells, that there is no other addition or was not at that time, located just as this is and in just as nice a manner and in every way adapted to the city of Topeka?

A. There are circumstances that made that a little more valuable in your estimation—that was the Potwin place—and in the manner in which he furnished people money to build with, giving the people an opportunity to build homes that could not get them in any other way. Now, there is the Jones property down there. I could have bought the Jones property for $300 or $400 an acre, which I consider better.

Q. As to the desirability for an addition to the city of Topeka, do you know of any land lying as near to the business part of the city as this is and located as that is at that time?

A. Why, I don't know of any place that lies right in the same way; no, sir.

Q. From what you may know, Mr. Sells, do you know whether or not this land could not have been sold for a great deal more money on the market at that time that you speak of, to your positive knowledge?

A. I don't know that it could have been sold for any more. I did not investigate that.

Q. Might it not have been, from what you know?

A. I don't know but what it could have been sold for more, and I don't know as it could.

Q. Do you know how many acres there are in that tract of land?

A. I understood there was over 86 acres—something like that.

ALLEN SELLS.

236 WILLIAM WELLHOUSE, a witness on behalf of the defendants, being by me first carefully examined, cautioned, and solemnly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

Direct examination—questions by Mr. SMITH:

Q. What is your name, age, place of residence, and occupation?

A. William Wellhouse; age, 53 years. I live in the city of Topeka, Kansas. I don't know as I have an occupation. I am vice-president of the First National bank. I stay in there a good deal of the time.

Q. How long have you lived in Shawnee county?

A. 27 years.

Q. How long have you lived in the city of Topeka?

A. About—pretty near 8 years.

Q. When living in the county, how far did you live from the city?

A. Most of the time about 12 miles.

Q. Have you been interested in real-estate matters during the last six or eight years?

A. Not a great deal in the city; no, sir.

Q. Have your duties as vice-president of the First National bank called upon you to ascertain the values of real estate in the vicinity of Topeka or in Topeka?

A. No, sir; not a great deal—not in that direction. I have heard it discussed and talked of a great deal, but official business there does not have much to do with real estate.

Q. From your general business experience and having lived in the city of Topeka for the past eight years, are you able to state whether or not you knew the market value of real estate in
237 the vicinity of Topeka in the months of June and July, 1886?

Q. Well, I don't know anything about it; only just by hearing of sales that were made. I had no personal experience in it, and do not know anything about it outside of that.

Q. You watched the transfer of property and sales of real estate during that time, have you not?

A. Yes, sir; somewhat.

Q. Well, from such information, in connection with your general business information, are you able to state whether you knew the market value of property in the vicinity of Topeka during the months of June and July, 1886?

A. As I stated, I know the value of it, if that is any criterion of values, by seeing transfers, and I suppose it is generally considered whatever you can sell a piece of property for that is what it is worth.

Q. You think you know the market value of property in the vicinity of Topeka in the months of June and July, 1886?

A. I know it in that way.

Q. Do you know the piece of property commonly called the Keith tract, located northwest of the city?

A. I know the piece of property called the Keith tract. I have no knowledge of it. It was pointed out to me as the Keith tract.

Q. A piece of property of 86 and ½ acres, lying northwest of the city?

A. I do not know anything of the amount; they call it 80 acres.

Q. Do you know anything of the market value of that property during the months of June and July, 1886?

A. Well, I don't know that I do, any more than that these
238 transactions seemed pretty high to me. I came here in an early day, and we used to buy land within a mile or two of town for twenty-five or thirty dollars an acre, and these five and six hundred dollar prices look terribly big to me.

WM. WELLHOUSE.

239 R. G. MARTIN, a witness on behalf of the defendants, being by me first carefully examined, cautioned, and solemnly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

Direct examination—questions by Mr. SMITH:

Q. What is your name, age, place of residence, and occupation?

A. My name is R. G. Martin; I am 50 years old; my occupation is real estate and insurance.

Q. How long have you been engaged in the real-estate and insurance business?

A. Off and on for about 14 years.

Q. Whereabouts?

A. Here in Topeka.

Q. Are you the Martin that has been a part owner of the Martin & Dennis addition to the city of Topeka?

A. No, sir; no relation.

Q. From your experience as a real-estate dealer and agent can you state whether you knew the market value of property in the vicinity of Topeka in the months of June and July, 1886?

A. Yes, sir; I think I was somewhat familiar with it.

Q. Do you know the piece of property commonly called the Keith tract, lying to the northwest of the city?

A. Yes, sir.

Q. Consisting of 86 and ½ acres of land?

A. Yes, sir.

Q. Do you know the market value of that property in the months of June and July, 1886?

A. Well, only in a general way.

Q. Well, you know it, then, in a general way, do you?

A. Yes, sir.

240 Q. What would you state the market value to be during the months of June and July, 1886, of this property, taking it in an entirety?

A. Well, I should think about $800 an acre.

Cross-examination—questions by Mr. QUINTON:

Q. What did you consider, Mr. Martin, from what knowledge and information you had concerning this land, that tract of land worth in March or April?

A. Well, I only gather my opinion from land that I considered about the same value, having absolute knowledge of what was asked for it.

Q. That is not an answer to my question. I asked you what you considered it worth in March or April, 1886—this tract of land.

A. I would not think there was much difference in prices.

Q. About $800 an acre?

A. Yes, sir.

Q. Potwin place built up very rapidly, did it not, during the spring of 1886?

A. Yes, sir; there was quite a move there in the spring of 1886.

Q. Land immediately adjoining the Keith tract of land on the south and on the south part of the east side has been built up pretty thoroughly, has it not, with houses?

A. Yes, sir.

Q. That is a very fine class of houses that are going up in Potwin place, is it not?

A. Yes, sir; good houses.

Q. Is it not the best dwelling part of the city, as far as houses are concerned?

A. Yes, sir.

Q. That started to build up in Potwin place along in the
241 fall of 1885, did it not?

A. Yes, sir.

Q. As they commenced building and the number of houses increased in Potwin place the values of land gradually increased around there, did it not, as well as all over the city, during the spring of 1886?

A. Yes, sir.

Q. Is it not a fact, Mr. Martin, that there was a gradual increase in property right along from month to month from the spring of 1886 up to the present time or up to the spring of 1887?

A. Yes, sir.

Q. I will ask you if that gradual increase was not about the same for each month along.

A. Up to what date?

Q. Up until the spring of 1887 did it not gradually rise in value from month to month, about the same, until it reached its present value in 1887?

A. Yes, sir; I think so.

Q. Is it not a fact, Mr. Martin, that property did increase in value in that particular part of the city, adjoining the Keith tract of land, from the spring of 1886 until the fall of 1886 from about $100 to $200 a month?

A. Per acre?

Q. Yes, sir; from what you know of it.

A. No, sir; that would not be my idea; it did not increase that much, I don't think.

Q. About how much do you think it increased during those months? There was a gradual increase I understand you to say.

A. It increased about three hundred dollars from June to December.

Q. That is not what I asked you, Mr. Martin. I asked you
242 about how much a month you thought it increased in value. You said there was a gradual increase per month, about the same each month, from the spring of 1886 to the spring of 1887. I asked you what you thought it increased per month now.

A. About $50.

Q. About $50 per month?

A. Yes, sir.

Q. It increased at the rate of $50 per month an acre from the spring of 1886 up until July or August, 1886?

A. Well, I would say it did.

Q. You stated that you thought this land was worth $800 an acre in the month of March, 1886. Now, what would you say it was worth the first of August, 1886?

A. Well, I should think it was worth a thousand dollars an acre.

243 GUY C. BARTON, a witness on behalf of the defendants, being by me first carefully examined, cautioned, and solemnly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

Direct examination—questions by Mr. SMITH:

Q. What is your name, age, place of residence, and occupation?

A. My name is Guy C. Barton; I am 48 years of age; I live at Omaha, Nebraska; I run a smelter.

Q. Where did you live prior to living in Omaha?

A. In North Platte, Nebraska.

Q. Are you acquainted with the complainant in this suit, Morrell C. Keith?

A. Yes, sir.

Q. How long have you been acquainted with him?

A. 27 years; I think it is about that.

Q. Are you acquainted with the defendants in this action, Mr. Kellam and Mr. Holliday?

A. I know Mr. Kellam; I don't think I ever met Mr. Holliday.

Q. From your acquaintanceship with Mr. Keith, the complainant, I wish you would state what his business qualifications are in conducting a business that he is interested in.

Objected to because it is incompetent, irrelevant, and immaterial.

A. I have been in business with Mr. Keith; we have had large business interests together, and I have always regarded him as a very bright business man.

Q. Is he a man that keeps posted in his own business affairs?

Objected to because it is incompetent, irrelevant, and immaterial.

244 A. Yes, sir; I think Mr. Keith one of the best business men in our State. He is not an educated man, but a particular bright and active man; he has that reputation.

Q. Are you acquainted with the piece of property, consisting of 86 and ½ acres of land, lying to the northwest of the city of Topeka that was formerly owned by Mr. Keith?

A. Yes, sir; I have seen the land.

Q. When, if ever, was your attention particularly called to it or when did you see it?

A. Oh, I have seen it several times within the last 20 years. Whenever I visited here or nearly every time I have seen the land.

Q. Did you see the land during the year 1885?

A. I am not clear about that; I don't know that I did see the land; I have seen it so frequently that I could not state positively whether at the time I was here in 1885 I visited the land or not, but my impression is that I did.

Q. How long were you here in 1885, if you remember?

A. Only a few days—two or three days.

Q. Did you inspect the growth of Topeka at that time—look around it?

A. Yes, sir; very generally at that time. I was all over the city, I think.

Q. Do you remember whether the property lying immediately west of this Keith tract was subdivided at the time that you were here?

A. Well, I understood that it was. I did not visit the addition. I did not visit this land that I remember of distinctly, but I was informed that it was subdivided.

Q. I refer to what is now commonly called Potwin place.

A. I think it was the property right directly west of this tract in question; I don't know that I can state the name.

245 Q. Upon returning to Omaha after your visit to Topeka at the time you refer to do you remember of meeting the complainant, Mr. Keith?

A. Yes, sir; I met him very often.

Q. What, if any, information did you give to him at any of the interviews after your visit to Topeka in 1885 as to the growth of Topeka or the character of this land of his?

A. Well, I gave Mr. Keith my impressions in regard to the future of Topeka and of the policy that in my judgment should be pursued with this land.

Q. Did you inform him that the property lying immediately to the west of his had been subdivided and platted?

A. Yes, sir.

Q. You say you gave Mr. Keith your impressions. I wish you would state what impressions you gave him. What were the impressions that you gave him?

Objected to because it is incompetent, irrelevant, and immaterial.

A. I told him that I thought the time had arrived when the property should be placed on the market; that the town was grow-

ing quite rapidly, and that I thought it had a bright future; that if the land was held out of the market that the tendency would be for the town to grow in another direction, as is the case very often in the growing of cities; that if they could not get property there it would be sought for in other directions and the town would crystalize in another form, and my judgment was that now was the time to act—that is, to plat it and place it in the hands of some responsible party or to sell it as a block—sell it altogether.

Q. At this time were you aware that Mr. Kellam was de-
246 sirous of purchasing the property himself—of acquiring an interest in it?

A. I cannot give any positive knowledge that I had of Mr. Kellam's intention. If I did have it at that time I told Mr. Keith of it, but my impression is that in this conversation I simply gave my views of the condition of affairs at Topeka as far as real-estate matters were concerned.

Q. Did you communicate to Mr. Keith in any subsequent conversation during the year 1885 the fact that Mr. Kellam was desirous of purchasing this property or acquiring an interest in it?

Objected to because it is incompetent, irrelevant, and immaterial.

A. I do not remember distinctly of having told him. I cannot remember any conversation in which I said to him that Mr. Kellam wanted to purchase it.

Q. Do you remember of his ever informing you that Mr. Kellam wanted to purchase it?

A. Yes, sir. Mr. Keith was at my house, I think it was, on the 22nd of November, 1885. It was the 25th anniversary of my marriage. He dined there with myself and friends, and among them was Mr. and Mrs. Kellam and Mr. Keith. He told me at that time that Ed., as we call him, wanted to buy the place, and, if I remember correctly, he asked me what I thought it was worth. I would not swear to that, however, but it was in that line of thought that we were talking of it. I knew nothing of the value of the property, and never have said to him what I thought it was worth, and never knew what it was worth only as I got the information——

Q. Did he tell you what offer, if any, Mr. Kellam had made him for the property?

A. Yes, sir.

Q. What did he say?

A. My recollection is that it was $40,000 that he offered
247 him for it, but not knowing anything about the value of the property and having no interest whatever in it I would not say that it was $40,000, but that is my recollection of it—that he said Ed. had offered him $40,000 for the property.

Q. Do I understand that this was the interview that occurred in Omaha in 1885?

A. November 22d, 1885, was the anniversary, and that was the day he was there. He was there very often, but it was on this occasion that I remember; it was after dinner that we were talking about the matter.

—. Mr. Kellam and his family and Mr. Keith were all there?

A. Yes, sir; they were all there at my house on that occasion.

Q. What Kellam do you refer to?

A. E. P. Kellam.

Q. One of the defendants in this suit?

A. Yes, sir.

Q. Are you interested in this controversy one way or the other?

A. No, sir; in no way.

Q. Are you equally as friendly to the complainant Keith as you are to the defendant Kellam?

A. Yes, sir; there is no reason why I should not be. I have had very friendly relations — both always.

Q. During the time that Mr. Keith and Mr. Kellam were at your house in November, 1885, did you ever see them talking together?

A. Yes, sir; naturally. They were all together in the house as friends would naturally be in the house of a host; they would talk together.

248 Q. There were several opportunities, were there not, for them to have private talks if they desired?

A. Oh, yes, sir.

Q. Do you remember what positions at the dining table at your house were respectively occupied by Mr. Kellam and Mr. Keith in November, 1885, at your wedding anniversary?

A. No, sir; I could not state; I thought I could place them, but I am mistaken.

Q. You remember, do you not, of both of them being there that day?

A. There is no question about their being at the table on this occasion, but just how they were seated at the table I would not undertake to say.

Cross-examination—questions by Mr. QUINTON:

Q. Mr. Barton, I will ask you if it is not a fact that Mr. Keith's time is not very fully employed with business and if he has not a great deal of business, and if he has not had for a great many years, to employ his time in Nebraska.

A. Yes, sir; he has been a busy man ever since I have known him.

Q. He has a great deal to attend to and a great deal on his mind, has he not, from what you know of him?

A. Well, I don't quite understand the sense in which that question is asked. If you mean that his mind is oppressed with business——

Q. No, sir; I just simply mean that his mind is employed with business all the time; if he has not a great deal of business to give his attention to.

A. He is a very active man, and he is in the saddle a great deal and superintending the details of business that really are not very laborious so far as the mind is concerned.

249 Q. You may state whether or not you know if Mr. Keith has been down to Topeka in the last fifteen or twenty years.

A. I don't know, sir.

Q. What is your best opinion of that, whether he has or not?

A. Well, sir, for the past six years I have known nothing of Mr. Keith's movements. He lived at North Platte and I at Omaha, and he might have been here every month during that time.

Q. What is your best opinion, Mr. Barton, as to whether or not he has been down here, if you have one, in the last ten or fifteen years?

A. I don't know of his having been here at all.

Q. You say you have been to Topeka frequently, Mr. Barton. Whom did you visit while you were in Topeka?

A. Mr. Kellam always.

Q. You staid at his house?

A. Yes, sir.

Q. Did your wife accompany you?

A. Sometimes.

Q. Staid there, too, did she?

A. Yes, sir.

Q. Are you a relative of Mr. Kellam?

A. By marriage; we married sisters.

Q. Your wife and Mr. Kellam's wife are sisters?

A. Yes, sir.

Q. You are his brother-in-law, are you not?

A. You might say so.

Q. You say you went out to see this land, Mr. Barton. Who took you out there? Who did you go out with?

A. With Mr. Kellam.

Q. You say you do not remember distinctly whether it was
250 in 1885 that you were down here and went out to see that land or not?

A. I cannot remember. I would not undertake to swear to being on the land in 1885.

Q. Did you go out to see the Potwin place in 1885?

A. My impression is that I did not. Mr. Kellam and I went all over the city, but I think we did not drive out to this place; that is my belief.

Q. Whom did you talk with besides Mr. Kellam in your visit of 1885 about the Potwin place, Mr. Barton?

A. I don't know that I talked with anybody unless it was Mr. Charles Kellam.

Q. Did you see the plat of the Potwin place in 1885?

A. I did not.

Q. How did you know that the Potwin place in 1885 was platted?

A. I was informed by—whoever my informant was; I think it was Mr. E. P. Kellam or Charles Kellam; but I am pretty clear that it was E. P. Kellam. I think it came about it in that way. I was trying to form a judgment in regard to Mr. Keith's land.

Q. How many times has E. P. Kellam taken you out to see that?

A. I should think I had been on the land with Mr. Kellam in the last 20 years eight or ten times.

Q. When you were in business with Mr. Keith you were in Topeka, were you not?

A. No, sir; it was at North Platte.

Q. Did you ever know of Mr. Morrell C. Keith living in Topeka?

A. No, sir; it was before I was acquainted with him that he lived here. I knew of his living here.

251 Q. Did you know of the circumstances surrounding or connected with his leaving Topeka?

A. No, sir.

Q. Did you ever hear him state any reason why or say any reason why he left the city of Topeka?

A. I think not.

Q. You were asked, Mr. Barton, if on your return from Topeka in 1885, in the conversation that you had with Mr. Keith, if you told Mr. Keith that Mr. Kellam desired an interest in that land, and you answer that you do not remember whether you knew that he desired an interest in the land at that time or not, but that if you did you told Mr. Keith so. What makes you think you told Mr. Keith that?

A. Because Mr. Keith and myself have been very intimate. We were in business together over twelve years. I had represented him in a great many cases—business matters—and our conversation together is entirely frank on all occasions.

Q. That is the reason why, then, you think you told him if you knew it?

A. If there was anything that I knew to Mr. Keith's advantage in that land I told him of it, and there was no reason why I should retain it if I knew of it, and it was solely in Mr. Keith's interests that I made any inquiry.

Q. At this conversation that you say you had with Mr. Kellam and Mr. Keith at the family reunion at your house on the 22nd of November, 1885, there was something said in that conversation, was there not, about platting this Keith tract of land—of Mr. Kellam's desiring to plat the tract of land and selling it out in lots?

A. Well, whether that was—it was not said in my presence. Between Mr. Keith and Mr. Kellam I heard nothing.

Q. I asked you if you had any recollections of having
252 heard or of knowing of anything of that kind being talked of at that time.

A. I say I heard nothing between Mr. Keith and Mr. Kellam.

Q. Do you know of or did you hear from any one of anything being said of Mr. Kellam's being desirous of platting the land at that reunion at your house?

A. No, sir; I would not swear that I did.

Q. You would not swear that you did not, would you?

A. Yes; I think I would swear that I did not hear anything said between Mr. Keith and Mr. Holliday in regard to the land.

Q. That is hardly an answer to my question.

A. Mr. Keith told me that Ed. wanted to buy the place, as I have

already sworn, but whether he said that he wanted to plat it I don't remember.

Q. In answer to a question on direct examination, Mr. Barton, you started to answer and was interrupted by another question. You stated in that answer, "I never knew what it was worth except as I got——." What were you about to say in that answer?

A. That I got the information in this way—from Mr. Keith.

Q. Do you mean, Mr. Barton, by that that you never knew what this property was worth except as you got its value from Mr. Keith?

A. I never bothered my head about the value of the property nor any other property in Topeka.

Q. That is not answering the question. The question was: Do you mean by that that you never knew what this property was worth except as you got its value from Mr. Keith?

A. Yes, sir; there is the only time that I remember of talking of its value.

Q. Did Mr. Keith state to you at that time what its value was?

253 A. No, sir; he did not.

Q. At what time did he ever state to you what its value was?

A. In the way that I told you. My impression is that he said that Ed. had offered him $40,000 for it; there was the only idea that I ever had of any value on the land.

Q. Then the values that you have ever learned of this land you say that you got them from Mr. Keith, and that he got them from Mr. Kellam, do you?

A. That is the only way that I know.

Q. Are you acquainted with Mrs. Kellam?

A. Yes, sir.

Q. Is it not a fact that she resided and lived with Mr. Keith before her marriage?

A. I think she did for a short time.

Q. Do you know whether or not Mr. and Mrs. Kellam have not been in the habit of visiting in Mr. Keith's family?

A. Yes, sir.

Q. Do you know whether or not Mr. Kellam did not marry his wife in Mr. Keith's house?

A. He did.

Q. Don't you know that Mr. Keith and Mr. Kellam have always lived in the most friendly relationship and the same as if a family relationship existed between them?

A. My recollection is that Mr. Keith was opposed to the marriage of Mr. and Mrs. Kellam; he was not present at the marriage.

Q. That is not an answer to the question at all, Mr. Barton. The question was, Don't you know that Mr. Keith and Mr. Kellam have always lived in the most friendly relationship, the same as if a family relationship existed between them?

A. You demand a categorical answer, do you?

A. Yes, sir; I demand a direct answer—yes or no—if you know that.

254 A. Yes, sir; I know what the relations have been between them.

Q. When you were in business with Mr. Keith, Mr. Barton, what was that business?

A. We were in the cattle business and hotel business together.

Q. Where were you in the hotel business with Mr. Keith?

A. At North Platte.

Q. Did you have charge of the cattle or the hotel business?

A. Why, it was a partnership arrangement.

Q. Which did you have charge of—the cattle business or the hotel?

A. Mr. Keith lived in the hotel and I outside; he ran the hotel more than I did.

Q. You particularly attended, then, the cattle business, did you not, Mr. Barton?

A. Well, as usual between partners, we both attended to the business. I will say frankly that I paid more attention to the cattle business than I did to the hotel.

The signature of the witness, Guy C. Barton, to the foregoing deposition is hereby waived by both parties.

LESTER S. WILSON, *Examiner.*

255 It is hereby agreed by both parties hereto that the signature to the depositions of the said D. L. Lakin, Joel Huntoon, G. G. Gage, Henry Taylor, George W. Reed, H. C. Lindsey, R. G. Martin, C. W. Jewell shall be waived, and that when duly filed with the clerk of said court the depositions shall have the same force and effect as if signed by the said witnesses respectively.

JOHN T. MORTON,
Solicitor for Def'ts.
QUINTON & QUINTON,
Solicitor- for Complainant.

256 EXHIBIT No. 1.

TOPEKA, KANS., *June 30th*, 1886.

DEAR MORELL A gentleman here wishes me to aks you if you will take a thousand dollars an acre for the south forty of your tract, or sixty thousand dollars for the whole.

He wishes an erly reply

Truly yours E. P. KELLAM.

All well.

257 EXHIBIT No. 2.

TOPEKA, KANS., *July 13th*, 1886.

DEAR MORELL Yours to hand in due time but I could not answer sooner. If you are still inclined to take his offer for the land, he would like to know how much you require down & the time and

rate of interest on the defered payments. I think there is no doubt but that he will take it if terms are satisfactory.

Very truly yours E. P. KELLAM.

Weather hot & dry

258 EXHIBIT No. 3.

TOPEKA, *Aug.* 4.

DEAR MORELL I forgot to ask you in my letter to day to send me abstract of title to land, if you have one, as it would save cost of getting another. If there have been any matters of record since the date of same they can be added to it.

I am satisfied that the sale will go through.

Truly yours E. P. KELLAM.

259 EXHIBIT No. 4.

TOPEKA, *Aug.* 4, '86.

DEAR MORELL I think sale will go through as per yours of the 29 ult. making first payment of twenty-five thousand dollars.

You will hear from me again in a few days.

Truly yours E. P. KELLAM.

260 EXHIBIT No. 5.

AUG. 11TH, 1886.

DEAR MORELL Enclosed you will find deed, made out, ready for your signature, when signed and duly acknowledged, please return it to me to be delivered by me to the party upon the payment of twenty-five thousand dollars, & the notes for the balance & mortgage. The balance will consist of two notes of seventeen thousand, five hundred dollars each. Making $35,000 & bearing interest at the rate of 6% per annum, payable in one & two years, & secured by mortgage on the land. Before I deliver the deed, will send the notes & mortgage to you for your approval and if all satis-

261 factory you return the mortgage to be recorded, & I will forward you a New York draft for the twenty-five thousand dollars. Not having heard from you in regard to the abstract of title will look it up at once.

Very truly yours E. P. KELLAM.

P S. Please sign with full name same as in deed, & fill date blanks.

K.

262 EXHIBIT No. 6.

TOPEKA, *Aug.* 21*st.*

DEAR MORRELL Yours to hand containing deed.

Col Holliday is in Boston, will return first of the week, when I will make out mortgage &c & have it recorded, & forward to you—

Truly yours E. P. KELLAM.

263 EXHIBIT No. 7.

TOPEKA, KNS., *Aug. 30th*, 1886.

DEAR MORELL Enclosed find draft for twenty-five thousand dollars to Nat Park Bank N. Y. No 46248, as per my telegraph, of this date. The balance of the papers will follow in a day or two.

Very truly yours E. P. KELLAM.

264 EXHIBIT No. 8.

Please to acknowledge Ed

TOPEKA, KAS., *Sept. 20th*, '86.

DEAR MORELL Enclosed find notes & mortgages, due in one & two years from date. The reason I did not send them before was because we were axious to get the release from Boshmen, before I put them on record. We have not yet got it, though I have written him twice & sent funds to pay the expense &c. but have not received any word from him. But to accomodate you in your Omaha deal will send to-day—although our attorneys say that the title is not clean without the release or a decree from the court.

Truly yours, E. P. KELLAM.

265 EXHIBIT No. 9.

No. 1495.

COUNTY TREASURER'S OFFICE,
TOPEKA, SHAWNEE CO., KANSAS, *Dec.* 17, 1881.

Received of M. C. Keith, by E. P. Kellam, one hundred seven & $\frac{73}{100}$ dollars in full for all tax of the year 1881 on the following described property, situated in Shawnee county:

Description.	S.	T.	R.	Twp	School district No.	Valuation.	Road tax.	Total tax.	Rebate or penalty.
S. 6½ acres of S.E ¼ of N.E ¼	25	11	15	----	53	250	62	6 49	16
E. ½ of S. E. ¼	25	11	15	----	53	4,000	10 00	104 00	2 60
Personal property.									
Total								110 49	2 76
Rebate or penalty								2 76	
Net amount								107 73	
Ex.								25	107 98

BRADFORD MILLER,
Treasurer Shawnee Co.
W.

By —— ——, *Deputy.*

266 Shawnee county.

Rates of Tax on Each One Hundred Dollars.

State tax	$ 50
County tax, general revenue	50
Interest and sinking fund for county bonds	80

Township tax.

Townships.	Twp.	Road tax.	Townships.	Twp.	Road tax.
(a) Rossville	10	15	(g) Monmouth	40	25
(b) Silver Lake	40	25	(h) Williamsport	20	30
(c) Menoken	25	25	(i) Auburn	20	25
(d) Soldier	20	25	(j) Dover	10	25
(e) Topeka	10	25	(k) Mission	15	30
(f) Tecumseh	15	25			

School district tax.

School districts.	Rate.	School districts.	Rate.
No. 1	$ 80	No. 41	$1 15
2	55	42	40
3	50	43	1 25
4	1 00	44	50
5	40	45	50
6	1 90	46	1 20
7	10	47	1 30
8	40	48	1 00
9	1 15	49	45
10 Joint	90	50	80
11	40	51	75
12	90	52	70
13	50	53	25
14	35	54	1 20
15 Joint	90	55	90
16	80	56	1 10
17	90	57	1 00
18	90	58	30
19	70	59	40
20	90	60	1 50
21	50	61	1 00
22	30	62	1 20
23	1 00	63	70
24	70	64	1 40
25	70	65	55
26	70	66	10
27	1 20	67	1 90
28	60	68	60
29	1 30	69	1 20
30	40	70	2 60
31	1 80	71	1 00
32	1 00	72	80
33	1 50	73	
34	70	74	1 80
35	60	75	85
36	70	76	1 75
37	1 45	77	65
38	90	78	70
39	55	79	60
40	1 22½	80	1 60

NOTE.—Townships on face of receipt are indicated by letters of alphabet as at margin above.

Leavenworth, Topeka & S. W. R. R. 70.

267 TOPEKA, *Dec. 5th*, 1881.

DEAR MORELL Below find statement of taxes on land.

Total amt	110.49
Rebate 2½ pr ct	2.76
	107.73
Exchange	25
Total	$107.98

Please remit before the 20th inst.

Truly yours E. P. KELLAM.

[Endorsed:] Dec. 13 81 $107.98 Taxes Pd E. P. Kellam

268 EXHIBIT No. 10.

TOPEKA, *Dec.* 29, '80.

DEAR MORELL Enclosed find tax receipt for tax for the year 1880. This does not include the road tax which is $10.62. See statement.

Amt tax less rebate	95.57
Enclosed recpt	84.95
	10.62
Cash on hand	5.05
Bal due	5.57

Truly yours E. K.

[Endorsed:] Recpt E. P. Kellam 5.57 Pd Jany 17 81.

269 It is hereby stipulated and agreed by and between the parties hereto that the depositions of Morrell C. Keith, H. C. Keith, Lester Eells, William Neville, to be taken before W. N. Cartwright, notary public in and for Lincoln county, Nebraska, wa-ving all objections to form and notice and official character of the officer, and that said depositions, being so taken, may be read as testimony of said witnesses in the case of Morrell C. Keith *vs.* Edward P. Kellam and Cyrus K. Holladay, now pending in United States circuit court in and for the district of Kansas.

QUINTON & QUINTON,
Solicitor- for Pl'ff.
ROSSINGTON, SMITH & DALLAS,
Solicitors for Def'ts.

270 UNITED STATES OF AMERICA, } ss:
District of Kansas, }

STATE OF NEBRASKA, }
County of Lincoln. }

Be it remembered that on this 19 day of October, 1887, I, W. N.

Cartwright, notary public, duly commissioned and qualified and by the laws of the United States authorized and empowered to take depositions in causes pending in the circuit court of the United States, did call and cause to be and personally appear before me, at the office of Wilcox & Williams, in North Platte, in the county of Lincoln and State of Nebraska, Morell C. Keith, William Neville, Lester Eells to testify and the truth to say on the part and behalf of the plaintiff in a certain suit or matter of controversy now depending and undetermined in the circuit court of the United States for the district of Kansas, at Topeka, in the district aforesaid, wherein Morell C. Keith is plaintiff and Edward P. Kellam and Cyrus K. Holliday are defendants.

And the said MORELL C. KEITH being about the age of 62
271 years and having been by me first cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in the matter in controversy aforesaid, I did carefully examine the said Morell C. Keith, and he did thereupon depose, testify, and say as follows, viz:

272 Q. 1. State your name.
A. 1. Morrell C. Keith.
Q. 2. Your age.
A. 2. 62 years old last November.
Q. 3. Where do you reside?
A. 3. North Platte, State of Nebraska.
Q. 4. How long have you resided in the State of Nebraska?
A. 4. 21 years.
Q. 5. Are you complainant in the case of Morrell C. Keith *vs.* Edward P. Kellan, Cyrus K. Holladay, in United States circuit court, in the district of Kansas?
A. 5. Yes, sir.
Q. 6. Are you acquainted with the defendant Edward P. Kellan; if so, how long have you been acquainted with him?
273 A. 6. Yes, sir; about 30 years.
Q. 7. Are you acquainted with Edward P. Kellan'-, the defendant's family?
A. 7. Yes, sir; I raised her from about 14 years old to — she was married; she lived with me from that time until she was married— I mean Edward P. Kellan's wife.
Q. 8. Was she, Edward P. Kellan's wife, living with you at the time Kellam married her?
A. 8. Yes, sir.
Q. 9. Were they married at your house?
A. 9. Yes, sir.
Q. 10. What relation, if any, was Mrs. Kellan to you?
A. 10. My wife was her aunt.
Q. 11. Do you remember when you first met Edward P. Kellan, and where?
274 A. 11. 1857, in Topeka, Kansas. It was 1857 or 1858; I can- tell which.

Q. 12. You may state whether or not Edward P. Kellan called frequently at your house prior to his marriage with Mrs. Kellan.

A. 12. He did.

Q. 13. Did you care and provide for Mrs. Kellan while she lived at your house, prior to her marriage with Mr. Kellan?

A. 13. I did.

Q. 14. Have the- lived with you—Mr. and Mrs. Kellan lived with you—since their marriage—lived with you in your family?

A. 14. They have been here one or two summers since I lived here.

Q. 15. You may state whether you ever had any interest in Mrs. Kellan—her welfare and prosperity.

A. 15. I done by her as I would by my own from they
275 time she came to live with me.

Q. 16. Since her marriage with Mr. Kellan has he, Edward P. Kellan, as her husband, been received and shared in your hospitality to Mrs. Kellan?

A. 16. Yes, sir; always on the most friendly terms.

Q. 17. You may state whether or not there has not been always a most friendly and family relation existing between you and defendant Edward P. Kellan.

(Question objected to by defendants' solicitors on the ground that it is leading.)

A. 17. Yes, sir.

Q. 18. I will ask you whether there has been any correspondence between you and Edward P. Kellan and his family, other than a business correspondence.

A. 18. None except a business correspondence.

276 Q. 19. Do you know the tract of land lying in or near the city of Topeka, Shawnee Co., in the State of Kansas, described as follows: East half of the southeast quarter of section 25, township 11 south, of range 15 east, of the sixth principal meridian; also a part of the east half of the northeast quarter of the same section, described as follows, to wit: Commencing at the south, east corner of the said northeast quarter and running thence north 13 rods, thence at a right angle west ¼ of a mile, thence at a right angle south 13 rods, thence at a right angle east to point of beginning, in Shawnee Co., State of Kansas, containing 86 acres, more or less?

A. 19. Yes, sir.

Q. 20. How long since you have seen said land?

A. 20. 19 or 20 years this fall.

Q. 21. Were you the owner of said land in the early part of 1886 and for many years prior thereto?

277 A. 21. I was the owner from 1858 to 1886.

Q. 22. Who, if any person, was your agent in the care and control of said land?

A. 22. Mr. Edward P. Kellan.

Q. 23. How long has Mr. Edward P. Kellan been you- agent in the care and control of said land?

A. 23. I think in 1871 or as late as 1872, when I fenced—or rather he done the business, I paid for it—gave him the use of it for attending to it and paying taxes.

Q. 24. How and through whom have you paid the taxes on said land?

A. 24. Through Mr. Kellan, sending him a draft to pay up to the last tax that I paid on it. He had collected some money off the railroad company for the right of way. He wrote me how much it would take beside what he had to pay the taxes and I sent him the balance.

278 Q. 25. How long have you so paid the taxes?

A. 25. I think since 1868.

Q. 26. Who informed you of the amount of the taxes each year?

A. 26. Mr. Kellan. He would write me how much the tax was and the time it had to be paid, and I would send him a draft to pay it.

Q. 27. Did Mr. Kellan pay the taxes in this manner for you prior to '71?

A. 27. My recollection is he has paid them ever since I was here in North Platte—since 1869.

Q. 28. You may state in full what, if any, agreement you had with Edward P. Kellan as to fencing the land.

A. 28. I told him to go on and fence it and keep account of the expense and I would pay him, and I did pay him.

279 Q. 29. Was there any different agreement between you and Mr. Kellan as to fencing the north line and the south line of said land?

A. 29. No, sir. When he took it there was a fence on the north line—not much of a fence—but his talk with me was, he was to go on and fence it—the north line and the south line—and I would pay for it, and I did. The fence on the north line was not much of a fence, but it had been used.

Q. 30. Who was to have the use of the land after it was fenced?

A. 30. Mr. Kellan.

Q. 31. What *what* Mr. Kellan to do or what consideration was he to pay for said use of the land, if any?

A. 31. He was to take charge of the land, see to paying taxes and keeping the tax down.

280 Q. 32. When you say he was to take charge of the land, in what capacity was he acting for you, if any, or what do you mean by taking charge of the same?

A. 32. I mean agent in any way connected with the land—in every way connected with the land.

Q. 33. I will ask you if, as such agent, whether or not he ever applied for and got a reduction of an assessed value of the land; if so, whether more than once.

A. 33. He wrote me that he did twice, I think.

Q. 34. Did you know of his doing this until after he had notified you that he had obtained said reduction?

A. 34. No, sir.

Q. 35. What, if any, money did he ever send you as collected from the use of said land?

281 A. 35. Not any.

Q. 36. What, if any, money did he ever account to you for as collected from a railroad company as a right of way through said land?

A. 36. He collected 300 and some dollars, I think; paid taxes with it, so he wrote me.

Q. 37. Did he, as your agent, attend to all the matters in regard to the right of way through said land?

(Question objected to by defendants' solicitors as incompetent, irrelevant, and immaterial.)

A. 37. Yes, sir.

Q. 38. At what time was this, if you remember?

A. 38. I should think it was in 1885 that this right of way commenced—when he got it through. The last tax that I paid he used that money to pay the tax.

282 Q. 39. You may state whether or not if in this right-of-way transaction he was not acting under the agreement and arrangement made by you at the time said land was fenced and testified to by you before.

A. 39. Yes, sir.

Q. 40. Did Edward P. Kellan at any time ever state to you what the value of said land was?

A. 40. Yes, sir.

Q. 41. What value did he state?

A. 41. He said it was worth $20,000.

Q. 42. When was that.

A. 42. It was the last time he was here. I can't tell just when it was. It was about three years this last summer or spring; that would be my recollection.

283 Q. 43. When, if ever, did he state to you that the value of the land had increased?

A. 43. He never stated to me at all.

Q. 44. What, if any, knowledge had you of the building up of an addition to the city of Topeka beyond and west of the said land called Potwin place?

A. 44. None at all, sir.

Q. 45. You may state what, if any, information you ever got from Edward P. Kellan in regard to the land immediately west of the said land described in this deposition.

A. 45. None, except that they had built an asylum there—an insane asylum, I think.

Q. 46. When, if ever, did Edward P. Kellan inform you of the building of any houses in Potwin place?

A. 46. I never heard of the place until this morning.

284 Q. 47. What, if any, knowledge had you of the value of real estate in 1886 immediately west of and adjoining your said land?

A. 47. I had not any knowledge at all of *all.*

Q. 48. Did you know of any price at which land was selling at in the city of Topeka in 1886?

A. 48. No, sir.

Q. 49. When, if ever, did you know that a street railway had been built on Sixth avenue in Topeka to a point further west than your said land?

A. 49. I did not know it at all.

Q. 50. What, if any, information had you in 1886 as to the manner in which the houses had been built in the city of Topeka near the south and east lines of your said land?

A. 50. Not any, sir.

285 Q. 51. Upon whome did you rely for information as to the value and circumstances affecting the value of your said land?

A. 51. Mr. Edward P. Kellan.

Q. 52. What, if any, information had you in 1886 of the erection of a large school-house on an acre of ground adjoining the east line of your said land?

A. 52. I had not any. The last information I had Mrs. Ward owned it and had a corn-field on it.

Q. 53. What, if any, information did Edward P. Kellan give you as to the proposed building of the Chicago, Kansas and Nebraska railroad, generally called the Rock Island, to Topeka?

A. 53. He said it was going 6 miles north and had given Topeka a black eye. I think it was 6 miles north.

286 Q. 54. When was it that he made this statement to you?

A. 55. The last time I had a talk with him before I saw him here in Omaha, and I think he wrote me about it.

Q. 56. What, if anything, did he say as to what effect the Rock Island not coming to Topeka would have upon Topeka?

A. 56. I could not tell what he did say. He said about what I have got in my other answer, and that it would have a bad effect on this end of town; that the railroad business would all be done in the other end of town—the east end.

Q. 57. Did you in the early part of July, 1886, receive from the defendant Edward P. Kellan a letter?

A. 57. Yes, sir.

Q. 58. Have you ever seen Edward P. Kellan's writing and do you know his writing?

A 58. I have seen it and know it very well.

287 Q. 59. In whose handwriting is that letter, and whose signature is it?

A. 59. Mr. Kellan's.

Q. 60. Will you hand the letter to the notary and to be attatched to your deposition, marked Exhibit No. 1?

(Said letter hereto attached, marked Exhibit No. 2.)

Q. 61. Whose handwriting is this letter and whose signature?

A. 61. Mr. Kellan's.

Q. 62. Will you hand letter to notary, to be made part of your deposition and marked Exhibit No. 2?

(Said letter is hereto attached and marked Exhibit No. 2.)

Q. 62. In whose handwriting and signature is this letter?
A. 62. Mr. Kellan.
Q. Will you hand same to notary, to be made a part of your deposition and marked Exhibit No. 3?

288 (Said letter is hereto attached and marked Exhibit No. 3.)

Q. 63. I will ask you if letters numbered 4, 5, 6, 7, 8—in whose handwriting they are and whose signature is attached to them respectively?
A. 63. E. P. Kellan's.
Q. You can hand same to notary, to be attached to your deposition, marked Exhibits No. 4, 5, 6, 7, 8.

(Said letters are hereto attached, marked Exhibit- No. 4, 5, 6, 7, 8 respectively.)

Q. 64. Did said letter of August 11, 1886, have inclosed with it a form of deed of said land ready for your signature?
A. 64. Yes, sir.
Q. 65. What did you do with said blank deed?
A. 65. I signed it, had it acknowledged, and sent it to Mr. Kellan, Topeka, Kansas.
289 Q. 66. Why did you send it to Mr. Kellan?
A. 66. Because he was my agent and was doing the business.
Q. 67. Up to the time of sending said deed did you have any knowledge or information that said Edward P. Kellan was to have any interest in said land, or that he had any interest in the land or was to have any such interest, or that he had any interest adverse to you?
A. 67. No, sir.
Q. 68. I will ask you, Mr. Keith, if they letters and correspondence introduced in this deposition was all the correspondence and letters received by you from Mr. Kellan in regard to sale of this land in 1886.
A. 68. No, sir.
Q. 69. Have you the rest of the correspondence or letters received by you from Mr. Kellan? If not, state why.
290 A. 69. I gave some to Mr. Neville to answer, and there is one before either of these letters—one before one that is marked No. 1.
Q. 70. Have you made diligent search to find the said letters that are missing? And, if so, state whether or not you have been able to find them.
A. 70. I have — diligent search to find them, but have not been able to find them.
Q. 71. You may state if you remember what the contents of said letters were.
A. 71. Yes; the one I do; the other I don't. I could tell part of it, but could not tell the whole.

Q. 72. I will ask you now to state, giving the date of the letter, when received, and what the contents of it was.

(To which question defendants' solicitors object for the reason that the same is incompetent and that a proper foundation has not been made to prove by oral testimony the contents of said written letter.)

291 A. 72. I can't give the date; it was but a few days before that first letter, marked Exhibit No. 1; he wrote that he had been offered $40,000 for the front 40 acres; that was pretty nearly all there was in it.

Q. 73. Did you answer that letter?

A. 73. I did.

Q. 74. I will ask you, Mr. Keith, to look at this letter and paper marked Exhibit No. 9, and this letter also, marked Exhibit No. 10. State what they are, in whose handwriting they are, and whose signature is attached to them.

A. 74. They are tax receipts, with letters from Mr. Kellan for amount of tax due; E. P. Kellan's handwriting and signature.

Q. 75. Will you hand them to notary, to be marked Exhibits No. 9 and 10 and to be made part of your deposition?

(Said letters hereto attached and marked Exhibits No. 9 and 10 respectively.)

292 Q. 76. I will ask you, Mr. Keith, if you received any letters from other parties in Topeka relative to this tract of land; if so, from whom?

A. 76. I have; I think man's name was Bartholomew; I received two, certainly, and I believe three.

Q. 77. Did you answer said letters? If not, why not?

A. 77. I did not answer them; I had one agent and did not want any more; all Mr. Bartholomew asked was for the agency of it; he sent me his circular.

(So much of the foregoing answer as gives the contents of written letters is objected to by defendants' solicitors as incompetent, and so much of said answer as gives the reason why said witness did not answer is objected to by defendants' solicitors as incompetent, irrelevant, and immaterial, and notice is hereby given that said defendant will move to strike said answer from said testimony.)

293 Q. 78. When you state you had one agent and you did not want any more whome do you mean by that?

A. 78. Mr. E. P. Kellan.

Q. 79. I will ask you, Mr. Keith, whether or not you relied upon any other source for information in regard to this land in any manner whatever and the one referred to by you, Mr. E. P. Kellan.

(Question objected to by defendants as incompetent, irrelevant, and immaterial.)

A. 79. No, sir.

Q. 80. Did you in all matters connected with said tract of land

have full faith and confidence in Edward P. Kellan managing, controlling the same for the protection of your interests?

A. 80. I did.

Q. 81. Did you have full faith and confidence, and rely
294 upon the same, of Edward P. Kellan selling said tract of land to Cyrus K. Holliday in 1886, protecting and guarding your interests in the same?

(Question objected to for the reason that it assumes that the defendant Kellan sold said property to Cyrus K. Holliday.)

A. 81. I had.

Q. 82. When, Mr. Keith, did you first learn or know of Mr. Kellan's having an interest in said land?

A. 82. It *is* in Omaha, about September 8, 1886.

Q. 83. Did you meet Mr. Kellan in Omaha on or about the 8 day of September, 1886?

A. 83. I did, sir.

Q. 84. Had you met him prior to 8 day of September, 1886, or had any conversation with him after June 1st, 1886?

A. 84. No, sir.

295 Q. 85. Have you seen him since or had any conversation with him since 8 day of September, 1886?

A. 85. No, sir.

Q. 86. When you met him in Omaha September 8, 1886, did you have any conversation with him concerning this tract of land; if so, what was it in full?

A. 86. I met him there, and after we had talked a little he asked me if I would not take Mr. Holladay's note for the whole amount of this sale. I told him I would not then, but would let him know in a couple of hours. He was so anxious that I thought he must be interested in some way. He told me how much Mr. Holliday was worth; I think it was a half a million; that he was perfectly good for this amount. I asked him if he did not have an interest in it. He said yes. The arrangement was that he was to have half interest.

296 Q. 87. Did Mr. Kellan make known to you or intimate to you in any way that he had an interest in that land before you asked him the question if he did not have an interest?

A. 87. He did not.

Q. 88. When, in answer to your question whether he didn't have an interest, he said he did, what reply, if any, did you make?

A. 88. If I recollect right, I did not make any reply. I did not make any reply.

Q. 89. When this conversation took place between you and Mr. Kellan had you executed and sent to Kellan a deed to that land? If so, how long before?

A. 89. I had. I can't tell you exactly. I think I sent deed same day it was signed and acknowledged.

297 Q. 90. When Mr. Kellan asked you at that time to accept Mr. Holliday's note for whole amount, was that proposition

in compliance with the manner of sale or terms of sale already agreed upon?

A. 90. No, sir.

Q. 91. What reason, if any, did Mr. Kellan at that time give for wanting the proposed change?

A. 91. Well, I don't know as he gave any reason on Mr. Holladay's side, but said if I was going to loan the money I might just as well leave it there as loan it somewhere else. That was not exactly his words, but the substance of it.

Q. 92. You may state what caused you to ask Mr. Kellan the question if he did not have an interest in that land at that time.

A. 92. He was so anxious to have me extend the time.

298 Cross-examination by CHARLES B. SMITH, solicitor:

Q. 1. Did you ever reside in Topeka?

A. 1. Yes, sir.

Q. 2. When did you leave there?

A. 2. In fall or winter of '58.

Q. 3. How large a place was it?

A. 3. About 1,500 inhabitants. I should not think any more—maybe not that.

Q. 4. At that time you were personally acquainted with both defendants?

A. 4. Yes, sir.

Q. 5. Have you met Colonel C. K. Holliday since then?

A. 5. Since then, but not for a good many years.

299 Q. 6. You had numerous other acquaintances in Topeka, had you not?

A. 6. Yes, sir.

Q. 7. You kept what was then known as the Topeka house?

A. 7. Yes, sir.

Q. 8. Were you personally acquainted with most of the business men of Topeka at that time?

A. 8. Yes, sir. I could not give ½ dozen names now, I don't believe. I don't believe there is a half dozen of them left.

Q. 9. Were you acquainted with Fry W. Giles, John Farnsworth, Dan. Horn, Mr. G. G. Gage, Mr. Washburn?

A. 9. I don't recollect Mr. Washburn. I knew all the rest.

Q. 10. Did you know if they are living there now?

300 A. 10. I knew Mr. Gage was there. I was told so a few days ago—maybe 6 weeks ago. I was told he was there. I did not know that the balance of them were there.

Q. 11. What has been your business in Nebraska?

A. 12. Keeping hotel, contracting, and raising horses and cattle.

Q. 12. What has been character of your business during past ten years?

A. 12. Keeping hotel, dealing in horses and cattle; not hotel for past 4 years.

Q. 13. You have carried on a very extensive business of that kind, have you not?

A. 13. Yes, sir; quite extensive.

Q. 14. Hasen't your business called you out of North Platte frequently to Omaha, Kansas City, and to other points east of North Platte?

301 A. 14. To other points east of North Platte, but not to Kansas City. I have been there two or three times in past 10 or 15 years.

Q. 15. What has been average amount of your business transactions per year for past ten years?

A. 15. I could not get at that very accurate.

Q. 16. Well, about?

A. 16. I could not begin to tell you, sir.

Q. 17. Well, the aggregate amount of your business transactions for the past ten years would be up in the millions, would it not?

A. 17. Oh, no; I don't think it would, sir.

Q. 18. Aren't you largely interested in real estate in North Platte, in other points in Nebraska, and elsewhere; also in various cattle companies and corporations, and aren't you generally regarded as one of the strong financial men of Nebraska?

302 (Objected to as being incompetent, immaterial, and not proper cross-examination.)

A. 18. That last question I can say as to, but I am interested in a cattle company which I would like to give some person $25,000 to let me out off. I own this block and one below here, half a dozen houses and lots in North Platte, and some land out in the country here.

Q. 19. What are the annual rentals of your property here in North Platte?

(Objected to as incompetent and immaterial and not proper cross-examination.)

A. 19. I could not tell that without going and looking; somewhere from $8,000 to $10,000 per year.

Q. 20. You have been generally advised, have you not, of the rapid growth of Topeka in common with most of Kansas towns during past 5 or 6 years?

303 A. 20. I have not, of the growth of Topeka. I had no idea that it covered the ground that it does.

Q. 21. Have you sought any information of the growth of Topeka during the past 10 years?

A. 21. I have not.

Q. 22. What did you originally pay for this property in controversy?

(Objected to as incompetent, immaterial, and not proper cross-examination.)

A. 22. I could not tell; don't think I bought it right out; I traded for it; I traded a pair of mules and paid the balance in money.

Q. 23. How much was the balance?

A. 23. I can't tell you what price was put on land, but I guess it was about $1,200 in addition to the pair of mules.

304 Q. 24. Has the defendant Kellan and wife visited your house since their marriage; if so, when?

A. 24. Frequently. The last time, a year ago this September, Kellan's wife left here Kellan met her in St. Joe.

Q. 25. How many times has Kellan been at North Platte?

A. 25. A good many times; stayed all one summer the last time he was here and stayed any—three to five years ago.

Q. 26. At the time he was here and spent part of the summer, as you say, diden't he come here for the purpose of trying to procure charge of the Depot hotel, and wasen't that his object in coming?

A. 26. I think so.

Q. 27. How long ago is that?

A. 27. I can't hardly tell; about 5 years or more.

305 Q. 28. Wasen't it about the time you ceased to operate the hotel here?

A. 28. I run it a long time after that; I can't tell how long or how long ago since he was here.

Q. 29. When did you cease to operate the hotel?

A. I could not tell you here; it must be four years, though.

Q. 30. Has Kellan been in North Platte since the time he was here trying to procure the hotel?

A. 30. I think he has been here once.

Q. 31. When was that?

A. 31. I can't tell; him and his wife was here since I went out of hotel; I think they were; I ain't posative.

Q. 32. When and where was it that you had a conversation with him in regard to enclosing the property in controversy with a fence?

306 A. 32. I could not tell you for sure, but I believe it was here somewhere from 1870 to '73, as far back as that. I was there in Topeka in 1869. A man by the name of Jewell had it, and Mr. Kellan wanted it, and I told him as soon as we could fix it so as to get Mr. Jewell out that he could have —, and I could not tell how quick. After that we had it fenced, and he has had it since.

Q. 33. What was Mr. Jewell doing with it?

A. 33. I think he just lit down on it and put up a fence on it and used it. That is all the recollection I have about it. He might have asked me for it. If he did I told him to take —, as it was doing me no good. I think it was in St. Joe, and I was not getting a nickel out of it.

Q. 34. What other conversation occurred between you and Mr. Kellan at the time you told him he could take it?

307 A. 34. I could not tell you the exact conversation. I told him he could take it and take care of it; see to building the fence. There was a washout on it. He agreed to see that that was fixed, but I don't think he ever done it. He had not the last time I talked with him about it.

Q. 35. Had you been sending money to him to pay taxes prior to this time?

A. 35. I don't believe I did. I don't believe he paid taxes on it prior to this time. I can't tell you exactly about it.

Q. 36. Had he anything to do with the land prior to this time?

A. 36. I don't recollect of his having anything to do with it.

Q. 37. When, as a matter of fact, was the land fenced, if you know?

A. 37. The last time I was there it was fenced, but Kellan
308 did not have anything to do with it; at least it was fenced on south side. I did not go down to north side. Mrs. Ward had a fence on east side, Bushman on the west.

Q. 38. Have you ever had any other interview with Mr. Kellan in regard to fencing this land except the one last above referred to?

A. 38. Not a personal interview. He sent me the bill of the fencing; I don't know how much it was.

Q. 39. Have you that bill?

A. 39. Have not; had a little fire since that.

Q. 40. Was there any agreement made as to what Kellan was to do, at the interview you have referred to, except as to his paying taxes for you?

A. 40. Why he was to take care of it and do all there was to do about it, and I guess he did go before board of equalization
309 and get it assessed down low; I think he got off $100.

Q. 41. There was nothing else to do?

A. 41. Nothing else at that time. A man could not have given it away at that time, I guess.

Q. 42. That was your understanding of all he was to do?

A. 42. Yes; it was all there was to do at that time.

Q. 43. Was it acting under this understanding that you sent, upon Mr. Kellan's request, the amount of money necessary to pay the taxes assessed upon this property?

A. 43. Yes, sir.

Q. 44. After Mr. Kellan commenced paying your taxes did he ever assume to act in connection with this land except for the mere purpose of paying tax and matters growing out of taxation, except upon direct authority from you to do any act or thing?

310 A. 44. There was not anything to do until this railroad business came up there. I instructed him to employ a lawyer; stop the railroads going through if he could. I told him if they would put a depot in there to give them the land for a right of way through it and the ground for a depot.

Q. 45. Then when this railroad condemnation matter came up you specially instructed him to act for you, did you not?

A. 45. I done what I gave in—in that other answer. He went in and settled it, and then wrote me about it.

Q. 46. He settled it under your instructions, did he not?

A. 46. No; he did not settle it as I instructed him. I do not know how it was settled, only he got the money and paid taxes with it.

311 Q. 47. Then in this condemnation proceedings for this railroad right of way Mr. Kellan acted in pursuance of instructions received from you at that time?

A. 47. Why, no; I don't know what he done; don't think he done anything; don't think he ever hired any lawyer, as I told him; don't know how it was settled. All I know is that he wrote me he had so much money for the damages and paid taxes with it.

Q. 48. He wrote to you about the condemnation proceedings before anything was done by him?

A. 48. He wrote me that the railroad wanted to go through there and wanted him to give them the right of way. I wrote him I would not do it without they would agree to put a depot there. I would give them the right of way and ground for a depot; to hire a lawyer and stop them if he could. That is the last I heard
312 of it until he wrote me he had the money.

Q. 49. Then such steps as Mr. Kellan took in this condemnation proceedings were by your instructions, were it not?

A. 49. Why no, he did not do anything. I instructed him to hire a lawyer and stop them if he could. If he did this I do not know it; he never has said anything about it. I don't know how he has come out with it, only he got the money.

Q. 50. You don't know, then, whether he did hire a lawyer or not?

A. 50. No.

Q. 51. And you don't know whether he followed your instructions or not?

A. 51. I don't.

Q. 52. Then you can't say, can you, that he did not act under your instructions?

313 A. 52. I can say he did not carry out my instructions.

Q. 53. In what respect did he not carry out your instructions?

A. 53. Don't think he hired any lawyer. If he did, he never brought in any bill.

Q. 54. In this condemnation proceedings Mr. Kellan was not acting under any agreement made between you and him, was he, except such as grew out of correspondence between Kellan and yourself in regard to railroad company going through your land?

A. 54. I never heard of this condemnation proceedings at all. I never got any notice of it. He was acting as my agent in the whole of it; there was no agreement.

Q. 55. He had no power to bind you as agent, had he, without especial authority from you?

314 A. 55. I ain't a very good lawyer, but I think I would have been bound to do anything he agreed to do in the matter.

Q. 56. You mean after the time you wrote to him about it, do you not?

A. 57. I mean any time; anything he done. I would have been bound to fill any contract he made.

Q. 58. When did Mr. Kellan state to you the value of this property?

A. 58. I got that answer in there somewhere. It was the last

time I saw him before I saw him in Omaha. I think it was three years ago this summer.

Q. 59. Wasen't it in 1879 when he was here?

A. 59. No; I think it was just three years ago this summer.

Q. 60. How soon after this was it before you saw him again?

A. 60. I saw him last September in Omaha.

315 Q. 61. Was that the only time you saw him after that?

A. 61. Yes, sir.

Q. 62. How did he happen to state to you the value of the property?

A. 62. I think he asked me what I would take — it. I told him I did not want to sell it. I asked him what it was worth. He said $20,000. I told him I did not think it would be a very good investment for me to sell. I kept it 20 years or more and it would not pay interest on it.

Q. 63. Have you any way of fixing the time when this conversation occurred?

A. 63. No; I have not. His wife was here three years ago last summer and he came here to meet her, or met her somewheres. I saw him at that time.

Q. 64. Are you certain that was the time this conversation occurred?

316 A. 65. I don't recollect of meeting or seeing him any other time, but I ain't posative of the time or when I met him.

Q. 66. Might i- not have been at a former visit of his here?

A. 66. No, sir; he was not here for a good while before that.

Q. 67. How long before that was he here?

A. 67. I could not tell you.

Q. 68. Do you remember of his being here in November, 1879?

A. 68. I don't, but he might have been here.

Q. 69. Where did this conversation occur?

A. 69. I could not tell whether it was here or in Omaha.

Q. 70. Did you see him both here and at Omaha three summers ago?

A. 70. Yes, sir; I think I saw him here and there both; saw him in Omaha.

317 Q. 71. Haven't you seen him since until you met him in September, 1886?

A. 71. No, sir.

Q. 72. Don't you remember meeting him there in November, 1885?

A. 72. I don't. I might have done it.

Q. 73. You state you have been the owner of this land for more than 25 years last past. Didn't you sell it to Guy C. Barton on February 21, 1867, for consideration of $4,000, and didn't you subsequently acquire title again under deed dated February 8, 1875, which deed was not filed for record until December 1, 1885?

A. 73. I put this in Guy C. Barton's hands when that deed was put in there. On that date there—I could not tell date—he deeded it back to my wife. She deeded it to me.

Q. —. Don't you remember of meeting Mr. Kellan in Omaha
318 in November, 1885, at which time you gave to him, for the purpose of taking it back to Topeka and having it recorded, the deed from your wife to yourself—the deed for this tract of land in controversy?

A. 73. I could not say whether I sent him that deed or gave it to him to have recorded; don't remember meeting him but once.

Q. 74. Don't you recollect of Mr. Kellan, in November, 1885, offering you $40,000 for this property?

A. 74. No, sir; he never offered it to me. I might have met him there, but don't remember about it.

Q. 75. Did you ever enquire of Mr. Kellan as to whether this property had increased in value since the time you had this conversation with him when he fixed the value at $20,000?

A. 75. I don't recollect of ever talking to him about it at any other time.

319 Q. 76. Did you write or cause to be written at any time any letters to Mr. Kellan seeking for information as to the value of this land?

A. 76. I never caused any to be written. If they were written I don't believe I ever asked any one to write them.

Q. 77. You state in your direct examination that you had no knowledge of the building up of an addition to the city of Topeka, Kansas, beyond your land, Potwin place. Did you ever seek for any information or knowledge of Mr. Kellan as to the building up of any addition or the general improvement of the town or the increase of values of properties lying adjacent to the city?

A. 77. I never talked with him any about this addition, for I never heard of it, but I talked with him about the growth of Topeka every time I met him. We had some talk as to how much
320 Topeka was growing. I got the impression from him always that the town was growing south and east. He never talked about any any improvements out there, only this asylum.

Q. 78. Wasen't there ever sent you a plat purporting to show a division of the property lying west of the land in controversy, which is now known a- Potwin place, with a request or proposition or suggestion that you join with Mr. Potwin, the owner of this tract, in a subdivision of the land in controversy, so that both pieces would comprise one uniform and entire subdivision?

A. 78. No, sir; that is straight goods. I never heard of this addition or the man's name. I would have remembered such a thing as that had I got it, sure.

Q. 79. Who has charge of your correspondence and business when you are absent from North Platte?

A. 79. No one.

321 Q. 80. What is done with your mail and letters?

A. 81. Kept *to* I come back.

Not being able to complete the taking of said depositions by reason that there is not time to complete the taking of the same to-day,

I adjourn the further taking of the same till to-morrow, at the hour of 9 o'clock in the forenoon, then to be continued at the same place.

W. N. CARTWRIGHT,
Notary Public.

Pursuant to adjournment stated, on the 20 day of October, 1887, at the hour of 9 o'clock in the forenoon, at the same place, I resumed the taking of said depositions as follows, viz., by continuing cross-examination of Morell C. Keith.

Adjourned to 9 a. m., October 20, 1887.

OCTOBER 20, 1887.

Cross-examination of MORRELL C. KEITH continued:

Q. 82. Did you know that the Rock Island Company were contemplating building its road to Topeka prior to the time of their coming in there?

A. 82. I did not know anything, only what Mr. Kellan told me about it. He told me it was going north of there, I think, six miles.

Q. 83. When did he tell you that?

A. 83. The last time I saw him before this sale.

Q. 84. What year was that?

A. 84. I can't tell you.

322 Q. 85. Did he state it as a fact or did he say it was rumored that that was the case?

A. 85. I don't think he said he knew that that was the case, but that was the impression he gave me—that it was going north. I think he told me why it was going north, but I don't remember the language he used.

Q. 86. In your direct examination you say you think he wrote to you about it. Where is his letter if that is the case?

A. 86. Destroyed or burned up. I did not keep any of his letters till these last ones.

Q. 87. Have you any distinct recollection of receiving a letter of that kind from him?

A. 87. Why, I don't remember the letter. I remember of his writing me about railroad matters two or three times.

323 Q. 88. About Rock Island railroad matters?

A. 88. I could not tell you about that part. I could not say positively about the Rock Island road. He told me about the Rock Island railroad, and I might have got it mixed up.

Q. 89. How long prior to the receipt by you of letter marked Exhibit 1, which is attached to your testimony, was it that you received another letter from Mr. Kellan, which letter you state as being lost?

A. 89. It was not but a few days. I could not say the number, but it was but a few days before.

Q. 90. How does it occur that you have preserved these other letters and did not preserve that one?

A. 90. I did not preserve any of them with the intention of keeping of them for any future reference till he was so long send-

324 ing me the money that I got scared about it and thought I had better hunt them up. There is more letters that I did not find.

Q. 91. Why did you get scared about it?

A. 91. Because they did not send me the money after they got the deeds.

Q. 92. Were you afraid that the sale was not going through?

A. 92. No, sir; I was afraid he might not send me the money, he had kept it so long.

Q. 93. Do you mean to say you were afraid Kellan would embezzel the money?

A. 93. No, sir; I was not afraid Mr. Kellan would steal the money, but I thought he was a long time sending it; if I recollect right, it was over two weeks.

Q. 94. Were you afraid you would not get the money?

A. 94. No, sir; I was not afraid of not getting it.

325 Q. 95. What was the contents of this letter received by you some time prior to Exhibit 1?

A. 95. It was an offer of some man for $40,000 for front 40 acres.

Q. 96. Did the letter give the name of the man?

A. 96. No, sir.

Q. 97. Do you give the language of the letter or the substance of it?

A. 97. The substance of it was he had an offer of $40,000 for front 40 acres.

Q. 98. Did he say the front 40 acres?

A. 98. Maybe not in that language, but that was the substance of it.

Q. 99. Did you reply to that letter; and, if so, when?

A. 99. I did; I think I wrote him next day I would not sell that way.

326 Q. 100. Is that all you wrote him?

A. 100. That is about the amount of it. I think that is just the amount of it.

Q. 101. What was the date of this answer?

A. 101. I could not tell you; it was about a week before the first letter; it was a few days before; I could not tell the number of days.

Q. 102. In your direct examination you mention another letter, the contents of which you did not remember, as having been written by Mr. Kellan. Was that letter received before or after the 30 of June, 1886?

A. 103. I could not tell.

Q. 104. After you received letter marked Exhibit 1 of your testimony did you reply to it; and, if so, how soon?

A. 104. Same day, I think.

327 Q. 105. What day did you receive Exhibit 1?

A. 105. I have no way of telling what day.

Q. 106. After the reception of Exhibit 1 did you consult any of your friends about the advisability of taking up the proposition contained in that letter?

A. 106. No, sir.

Q. 107. Where were you when you received this letter?

A. 107. Here in North Platte.

Q. 108. Didn't you take several days to deliberate over the advisability of taking up the proposition?

A. 108. No, sir; I think I answered it the day I got the letter or the next day. I haven't any way of knowing just when I answered it only just by memory.

328 Q. 109. Paper here shown witness, which paper also produced before the notary with the request that he attach his signature thereto, to the upper right-hand corner, for the purpose of identification; and thereupon the witness is asked the following question: Isn't this the letter that you wrote to Mr. Kellan in reply to his letter to you of June 30, 1886?

A. 109. I should think it was, sir.

Q. 110. That letter is in your handwriting, is it not?

A. 110. Yes, sir.

Q. 111. Why, in this letter of July 7 to Mr. Kellan, in reply to his letter of 30 of June, did you couple the acceptance of the proposition with the condition if the purchaser should take it within a few days?

A. 111. I don't remember what was my object to it. I would not have believed I done it if it wasen't there.

329 Q. 112. You had some object in doing it, had you not?

A. 112. I don't remember a thing about having any object. I suppose there must have been some object for my writing in that way, but I don't remember a thing about it. I certainly did not need the money.

Q. 113. Wasen't you desirous of selling the land then?

A. 113. No, sir.

Q. 114. Did you consider you were selling it too cheap?

A. 114. No, sir.

Q. 115. Why did you use the expression, then, "I would rather you would have it," referring to Mr. Kellan?

A. 115. Mr. Kellan had wanted me to have it platted, and if I had it done I had agreed to let him sell it; if I done it in that way or sold it in that way.

330 Q. 116. When did Mr. Kellan want to have you plat it?

A. 116. I could not tell you the time. It was some meeting I had with him, and I think he wrote me about it.

Q. 117. How long before this time was it?

A. 117. I could not tell the time or dates.

Q. 118. Did he explain to you the reason why he wanted to have it platted?

A. 118. I don't think he explained it in any way, only it was a good way to sell it.

Q. 119. Did he tell you the reasons why it was a good way to sell it?

A. 119. I don't remember. If he made any reason I don't remember it.

Q. 120. Had you made up your mind to have it platted?

A. 120. No, sir.

331 Q. 121. You knew it was desirable land for that purpose, [illegible]n did you not?

A. 121. I knew part of it laid in good shape for residence lots.

Q. 122. Did you think you could get more money out of it by having it platted than you could by selling it in bulk?

A. 122. That would be a common-sense view of it, but I did not want to do it that way.

Q. 123. Why diden't you want to do it that way?

A. 123. It would increase the taxes and take a good while to sell it out. I did not suppose it would all sell for a good while.

Q. 124. Was that the reason that you accepted the proposition in the letter of June 30?

A. 124. I did not take that into consideration at all. I supposed Mr. Kellan was selling property for all it was worth.

332 Q. 125. Had you ever received other propositions from other parties for the purchase of this property prior to the time you received Mr. Kellan's letter of June 30, 1886?

A. 125. Not for a good many years; I think in '60 or '61 I had an offer for part of it, but none after it.

Q. 126. Diden't you receive an offer in 1880 through Ross & McClintock, a real-estate firm in Topeka, for the purchase of this property?

A. 126. No, sir; I never received any offer from anybody.

Q. 127. Diden't you receive a proposition from Bartholomew & Company, of Topeka, for the purchase of this property, or that they might be permitted to subdivide it and dispose of it by selling lots some time during the year 1885?

A. 128. I could not tell the dates of the letters I got from them, but I got some letters from them with circulars in, wanting

333 the agency of it.

Q. 129. Have you those letters?

A. 129. No, sir.

Q. 130. Where are they, if you know?

A. 130. Destroyed.

Q. 131. After writing your letter of July 7 to Mr. Kellan was his letter of July 13, which is attached to your testimony as Exhibit 2, the next letter that you received from him?

A. 131. I should think it was.

Q. 132. Where were you when you received this letter?

A. 132. North Platte.

Q. 133. When did you receive it?

A. 133. I could not give the date.

334 Q. 134. After the receipt of this letter were you still inclined to take the offer made for the land?

A. 134. Yes, sir.

Q. 135. Did you reply to this letter of July 13?

A. 135. I think I did, sir.

Witness here shown letter dated July 20, which the notary is requested to attest by writing his signature across upper right-hand corner, and witness is thereupon asked following question:

Q. 136. Is that letter in your handwriting?

A. 136. Yes, sir.

Q. 137. Was that the letter written by you in reply to Mr. Kellan's letter of July 13?

A. 137. I should think it was, sir.

Q. 138. This was sent by you to Mr. Kellan. It appears not to be signed.

A. 138. I wrote it and sent it.

335 Q. 139. What was the next letter you received from Mr. Kellan?

A. 139. I don't know what was the date of it nor the contents.

Q. 140. You remember receiving a letter from him making more definate propositions as to terms of payment, do you not? Do you know where that letter is?

A. 140. Yes, sir. I don't know where it is if it is not in these letters here.

Q. 141. Did you accept one of the various propositions made in this letter?

A. 141. I accepted the proposition, as he wrote me the contract was made.

Witness here shown letter dated July 29, which the notary is requested to attest by his writing his signature in upper right-hand corner, which is accordingly done, and thereupon witness is asked the following question:

336 Q. 142. Is that the letter written by you in response to last letter referred to received from Mr. Kellan?

A. 142. That's in answer to his letter written asking me how the payments should be made.

Q. 143. After your letter of 29 to Mr. Kellam was the letter mentioned in Exhibit 4 of your testimony the next letter you received from him?

A. 143. Yes; I think so.

Q. 144. At that time you were still inclined to sell, were you not?

A. 144. Yes, sir.

Q. 145. Was letter dated August 11, being Exhibit 5 of your testimony, the next letter you received from him?

A. 145. I should think it was, but I can't tell posative about it.

Q. 146. Did you finally accept the terms of payment—the rate of interest—and comply therewith by executing a deed as

337 requested in Mr. Kellam's letter August 11.

A. 146. I signed the deed and sent it.

Witness here shown letter dated North Platte, 18th, which letter is produced to notary with request that he attest same with his signature, which is accordingly done, and thereupon witness — asked following question:

Q. 147. Is that your reply to last letter referred to from Mr. Kellam with which you enclosed the deed mentioned?

A. 147. I should think it was.

Q. 148. Is the letter marked *marked* Exhibit 6 of your testimony the next letter you received from Mr. Kellam in regard to this matter?

A. 148. I can't say posative whether it was the next one, but should think it was.

Q. 149. Up to this time did you know in whose name the purchase was being made?

338 A. 149. I can't tell you straight about that; whether it was before or after that he wrote me who was going to have it. I should think these letters would show.

Q. 150. You did not care who was going to have it, did you?

A. 150. I did not think about who was going to have it.

Q. 151. All you were looking after was the getting of $25,000 and the balance properly secured by mortgage, was it not?

A. 151. I had not any idea who was going to have it until he wrote me, and it did not make any difference who he was selling it to. I was interested in getting the money and having it secured right.

Q. 152. You accomplished both of those objects, did you not?

A. 152. Yes, sir.

339 Q. 153. Is the letter which is marked Exhibit 7 of your testimony the one in which the cash payment for purchase of this land, or, rather, a draft for such payment, was enclosed?

A. 153. I don't think I got draft August 30; that is not my recollection of it. If you let that stand I will find out when I got the draft and tell after dinner. My recollection of it is I did not get draft until after I saw him in Omaha.

A. 154. This is the letter in which draft was enclosed, was it not?

A. 154. I should think it was.

Q. 155. You got draft and applied it to your own use, did you not?

A. 155. Yes, sir.

Q. 156. You subsequently got the notes and mortgages securing balance of the purchase-money, did you not?

340 A. 157. Yes, sir.

Q. 158. Were they enclosed with a letter marked Exhibit 8 of your testimony?

A. 158. I should think they were.

Q. 159. You accepted these notes and mortgages, did you not?

A. 159. Yes, sir.

Q. 160. What did you do with them?

A. 160. I gave them to my clerk to put in the safe.

Q. 161. How long did they remain in your safe?

A. 162. I think they are there now; if they ain't, there is a misdeal somewhere.

Q. 162. Have they been there continuously from time you received them?

A. 162. To the best of my knowledge, they have.

341 Q. 163. Have you ever endorsed the notes?

A. 163. No, sir.

Q. 164. Have you ever used them as col-ateral security for any purpose?

A. 164. No, sir; I have never seen them since they were put in the safe.

Q. 165. You are still the owner and holder of them, are you?

A. 165. Yes, sir.

Q. 166. At the time you accepted these notes and mortgages you knew, did you not, that Mr. Kellann, the defendant, had acquired a half interest in the land in controversy?

A. 166. Yes; I knew it.

Q. 167. You did not care then if he was interested in the land?

342 A. 168. I was not very well sati-fied when I found out he was interested in it.

Q. 169. Where were these notes made payable?

A. 169. I don't remember.

Q. 170. Wer-n't they made payable at the Omaha National bank?

A. 170. I don't remember where they were made payable.

Q. 171. Have you looked within the last six or eight months to ascertain where they were made payable?

A. 171. Have never seen them since I got them and gave to the boy to put in the safe.

Q. 172. When did the first one mature?

A. 172. One year from time it was given. I don't know the exact date.

343 Q. 173. Didn't you receive during the month of August last a notification from the officers of the Omaha National bank or some one of them that a draft was there for some $19,000 with which to pay the first of these notes, with interest that matured on August 19, 1887?

A. 173. They notified me they were authorised to pay note and interest due August 19 and the interest on the second note.

Q. 174. When did you first become dissatisfied with the sale of the property in controversy?

A. 174. When Mr. Kellam told me he *was* had an interest in it.

Q. 175. What steps, if any, did you take to prevent contract of sale being carried out?

A. 175. I had carried out my part of contract when I knew it.

344 Q. 176. Still the matter had not been closed up, had it?

A. 176. According to his letters, it had been.

Q. 177. At that time you haden't received either the purchase-money or the mortgage and notes, had you?

A. 177. If I ain't mistaken in the dates, I had not.

Q. 178. Was the mere fact that Kellam was to have an interest in the property the only reason that you were first dissatisfied with the sale?

A. 178. That was the first reason. The next reason was a man told me he was offered $150,000 for it before the sale was made.

Q. 179. When did a man tell you that?

A. 179. It was maybe a month after the sale; maybe two months; I don't remember exact time.

345 Q. 180. What month would it be in?

A. 180. Sale was finished about first of September—between

the first to the tenth—is my recollection of it. His letters don't go that way.

Q. 181. Wasen't sale finished 29 of July, at which time you agreed to take $25,000 cash and balance on time?

A. 181. I don't understand sale was finished until I got my money. That was some time in September. That is the way I recollect it.

Q. 182. Who was the man that told you Kellam had been offered more for the land?

A. 182. Dennis Sheedy, in Denver. He told me man's name that offered it, but I don't remember it.

Q. 183. Who is he?

A. 183. He is in a bank in Denver—a cattle man, who owned some land near Topeka.

346 Q. 184. At or about this time did you receive any letters from Topeka real-estate men in regard to this sale?

(Objected to as incompetent, irrelevant, and immaterial and not proper cross-examination; and solicitators give notice that they will move to strike question and answer from testimony.)

A. 184. I can't tell you about time, but I received letters.

Q. 185. From whom did you receive letters?

(Objected to as immaterial, incompetent, and not proper cross-examination.)

A. 185. I don't remember names of the parties.

Q. 186. Did any of them urge you to enter into litigation or volunteer to furnish testimony in consideration of their having an interest in property in case you recovered or to act as your agent in platting and disposing of this property if you should set aside the sale?

347 (Objected to as incompetent, immaterial, irrelevant, and not proper cross-examination.)

A. 186. They diden't any of them urge me and aren't to have anything to do with platting and disposing of it after I get sale set aside, if I do. There isen't any understanding of it. I don't remember names of parties that wrote me.

Q. 187. Is there any person except yourself interested in your recovery of this property and setting aside sale you made of it except and outside of your attorneys?

A. 187. No, sir; nobody but the attorneys.

Q. 188. Who do you consider your attorneys?

A. 188. Mr. Neville and Quinton. There are two others; Mr. Neville made the arrangements; don't know their names and don't know as I would were I to hear them.

348 Q. 189. Do you know whether A. D. Robbins and Company or Thomas L. Ross or either of them are interested, directly or indirectly, in your behalf in this litigation?

A. 189. They are not, that I know of.

Redirect by QUINTON, solicitor for plaintiff:

Q. 1. You stated in your cross-examination that Mr. and Mrs. Kellam had visited at your house frequently and staid some time. You may state about what was the longest time they ever visited at your house in North Platte, Nebraska.

A. 1. I have not kept any account of it. They have been here often. I think Mrs. Kellam, the last time she was here, stayed about a week each time, and about twice within three years. I think the last time before that she was here about a week. She went to Omaha and came back and staid some time—quite a while—but I don't know how long.

349 Q. 2. While you were running hotel here did either Mr. or Mrs. Kellam stop at hotel at any time you remember of?

A. 2. Yes, sir; a good many times; once stayed all summer—I should think fully three months.

Q. 3. Did you ever charge either of them anything for stopping either at your house or hotel; and, if not, why not?

A. 3. I never charged them anything, on account of their relationship. He came here to get this hotel; came here by my request; but failed to get it. I asked him how much he was out in coming here. He said about $300. I gave him the money. I was not under any obligation to give it to him.

Q. 4. While you were running the hotel did Mr. Kellam and his wife have the supervision and charge of the same at any time for you; if so, how long?

350 A. 4. Not for me. They started in to run it and failed. I don't think the- run it long—might about 10 days—but I don't think they did more than a week.

Q. 5. You stated in your cross-examination you instructed Kellam to hire an attorney and stop the railroad from running through your land. Did Mr. Kellam ever inform you of his doing so?

A. 5. I done that through Mr. Neville. He never informed me.

Q. 6. You said in your cross-examination that Mr. Kellam settled it, and gave you credit for about $300 in payment of taxes. Do you in any manner — how he made this settlement?

A. 6. I don't know anything about it. He wrote me there was that much money there paid by the railroad company as damages, and been there a good while, and I had better use it to pay taxes.

351 Q. 7. Do you know whether or not that was the damages allowed by the railroad company, except what you learned from E. P. Kellan, as above stated?

A. 7. All I know about it is what I learned from him.

Q. 8. Did you ever enquire into the matter to ascertain whether or not you had been paid reasonable damages for said right of way or make any enquiry as to how it had been settled?

A. 8. Not a word; never asked any questions.

Q. 9. Why did you not make enquiry and ascertain the same?

A. 9. I had confidence in Mr. Kellan's doing it just as he would if it was his own.

Q. 10. Did you, then, rely on Mr. Kellam attending to this
352 matter for you the same as if it was his own and accept the same as final?

A. 11. I did, and if there was any writings to be signed he must have signed them as my agent, for I never heard of them or had anything to do with them in any way.

Q. 12. You stated in your cross-examination that you instructed him to employ an attorney and stop them going through there, if he could, unless they would place a depot upon the ground. I will ask you now, if the railroad company did go through there, whether or not they were not allowed to do so by Mr. Kellam and contrary to the instruction and all of the instructions by you at that time?

A. 12. They went through, contrary to my instructions at that time.

Q. 13. You may state whether or not then you did not ratify Mr. Kellam's actions in that transaction as being done by him
353 under the authority, as your agent, given previously *or* 1871.

A. 13. I did.

Q. 14. Did you in your conversation with Edward P. Kellam, in Omaha, September 9, 1886, say to him that you were satisfied with said sale or with him after he informed you that he was to have an interest in said property?

A. 14. I diden't and wasen't satisfied. If I had been I would have paid him for making the sale.

Q. 15. You stated in your cross-examination that you had been acquainted with Mr. Giles and several other citizens in Topeka. I will ask you that if in 1886 you knew of any of your personal acquaintances living in Topeka at that time aside from your agent, Edward P. Kellam?

A. 15. I didn't know that any that was named lived there.

354 Q. 16. You stated in your cross-examination that you had not made any inquiry of any other persons than Edward P. Kellam as to the value and prospects of this tract of land becoming valuable. I will ask you to state why that was.

A. 16. I had confidence in him and never thought of asking anybody else about it. I talked with him several times about it.

Q. 17. As a matter of fact, Mr. Kellam did inform you of a few things in regard to said tract of land, as to railroad and assessed valuation of said property, without you having to enquire for same, had he not?

A. 17. He always kept me posted about taxes and valuations and as to his getting valuation down.

Q. 18. You may state whether or not you relied on Mr. Kellam's informing you as to the value of the property and keeping
355 you posted in any matter as your interest might demand?

A. 18. I relied on his keeping me posted with everything connected with the land.

Q. 19. You stated yesterday in your cross-examination that at the time Kellam sent you this proposition of $60,000 for this tract of land in 1886 you made no enquiry of him as to the value of the

land. I will ask you if at that time you relied upon him to act for you in that matter?

A. 19. I did.

Q. 20. You may state whether at that time Kellam informed you in any manner of the said tract of land being of greater value than $60,000.

A. 20. He did not.

Q. 21. You may state whether or not by his not saying anything to contrary when he sent you that proposition you did not believe he was getting the best price for same that could be
356 gotten and guarding your interests to that effect.

A. 21. I did.

Q. 22. You may state whether or not you acted on that belief and relied upon him in this transaction until the deeds had been passed and the matter closed up.

A. 22. I did.

Q. 23. In regard to letter No. 1, in your deposition you stated, in your cross-examination, you thought you answered it same day you received it. I will ask you if it could not have been possible for that letter to have been in North Platte a few days before you got it and read it?

A. 24. Yes, sir; it might have been here several days.

357 Q. 25. You have several times in your cross-examination — of letters and correspondence being destroyed by fire. Do you mean that you destroyed them yourself, or that such letters and correspondence were destroyed by accident?

A. 25. By accident.

Q. 26. I will ask you, Mr. Keith, to look at letter No. 2, in your deposition, and ask you to state if that is the proposition to which you made answer in your letter of July 29 to E. P. Kellam, in which you stated I will take $25,000 down and the balance to suit you?

A. 26. Yes.

Q. 27. In that letter of July 29, when you said balance to suit you, what did you mean by that to Mr. Kellam?

A. 27. I meant that any arrangement he made with — man would satisfy me.

358 Q. 28. I will ask you, then, if you knew what arrangements Kellam did make other than $25,000 cash down until you received letter number 5 of your deposition, stating what terms and arrangements he had made for you and sending you deed for your signature?

A. 28. I did not.

Q. 29. Were the terms and conditions made by said Kellam as set forth in said letter number 5 accepted by you?

A. 29. They were.

Q. 30. You may state whether or not you believed at that time Kellam was acting in good faith for your interests, and if that was one of the reasons why these matters were left to him.

A. 30. It was.

Q. 31. You stated in your cross-examination that you thought that the letter received August 11 from Edward P. Kellam

359 was the next letter received after the letter received from Edward P. Kellam dated July 13. I will ask you if it is not a fact that letters numbered 3 and 4 in your deposition were not received by you before the letter of August 11?

A. 31. I believe I got both of them letters same day; they were received before August 11 letter.

Q. 32. You stated in your cross-examination that Kellam wanted you some time ago to plat the land and allow him to sell it in that way. You may state all of the conversation as near as you can remember relative to that.

A. 32. Why, I can't state the exact conversation, but the amount of it was he thought I could get more for it that way that I could any other way. I told him I thought if we would do it that way we would sell off a few front lots and I would have a lot of the back lots left; that the taxes would be a good deal more than to
360 leave it as it was, but that if I did do it he should have the selling of it.

Q. 33. Was he desirous of having you plat the same?

A. 33. He was.

Q. 34. You stated in your cross-examination that you became dissatisfied when you knew that Kellam was getting an interest in the land. I will ask you if that dissatisfaction was from any objection to Kellam himself.

A. 34. I had perfect confidence in Mr. Kellam until I learned him by experience, and we were always good friends—first rate.

Q. 35. You stated in your cross-examination that in 1867 you deeded said land to Guy C. Barton. I will ask you if there was any consideration paid at that time for said land by Guy C. Barton?

A. 35. There was not.

361 Q. 36. You may state how it came that this deed was made the deed to your wife and from your wife to you, and whether or not your wife at that time did not hold said property in trust for you.

A. 36. I deeded this property to Guy C. Barton first. I had a partner, and he was a real slick fellow, and he got me into some trouble. I put it there to keep it from some creditors' debts that this partner had made till I could get around to it and pay it, which I did in the course of a year. I left it in my wife's hands for years. Her health got bad, and I had it deeded back to me.

Q. 37. Was there any consideration from your wife to Guy C. Barton for said land at the time he deeded it to her?

A. 37. None.

Q. 38. In your cross-examination you were asked if any real-estate men or other parties in Topeka volunteered assistance or the
362 procurement of evidence f-r you for an interest in said land, with other questions. To this question you made no answer. I will ask you now if any one has in the city of Topeka volunteered to procure evidence for you, for any consideration, in the prosecution of this case, outside of your attorneys?

A. 38. No, sir.

MORELL C. KEITH.

Subscribed in my presence and sworn to before me by said Morell C. Keith this 20 day of October, 1887.

{ Notarial Seal W. N. Cartwright, Lincoln County, Nebraska. Commission expires May 23*th*, 1893. }

W. N. CARTWRIGHT,
Notary Public.

363 And also the said WILLIAM NEVILLE, being about the age of 43 years and having been by me first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in the matter of controversy aforesaid, I did carefully examine the said William Neville and he did thereupon testify and say as follows, viz:

Q. 1. Your name?
A. 1. William Neville.
Q. 2. Where do you reside?
A. 2. North Platte, Nebraska.
Q. 3. How long have you resided here?
A. 3. About 11 years.
Q. 4. Are you acquainted with the plaintiff, Morrell C. Keith, and the defendant Edward P. Kellam?
A. 4. Yes, sir; I am.

364 Q. 5. You may state if you ever lived with plaintiff, Morrell C. Keith.
A. 5. I did.
Q. 6. Are you related to plaintiff, Morrell C. Keith?
A. 6. My first wife was his daughter.
Q. 7. You may state whether or not you met at Mr. Keith's house the defendant Edward P. Kellam and wife at any time; if so, when, or either of them.
A. 7. I met them both at his residence, in the Railroad hotel here. I think first in 1877; afterwards and frequently in 1878, '79, or '80. I will not be sure which. I met them in '82 or '83—I think '82. I met Mrs. Kellam in '84, in March, and both of them in the summer of '84. I don't remember — time. I won't say positively whether it was in 1884 or '85, but think it was in summer of '84. I met Mrs. Kellam about 1st September, 1886, at his

365 house. I don't think I saw Mr. Kellam on that trip.
Q. 8. How do you fix date of March, '84, that they were at Mr. Keith's residence?
A. 8. My wife, Mr. Keith's daughter, died on 1st day of March, 1884, and Mrs. Kellam was here to attend the funeral. In the summer following Mrs. Lockwood, of Washington, an aunt of Mrs. Kellam's, visited us and spent the summer—visited Mr. Keith. I was living with him at that time, and Mrs. Kellam and Mr. Kellam came over to see her while here and also visited Mr. Keith.
Q. 9. In any conversation you may have had with Mr. Kellam did he say anything about the relationship existing between Mr. Keith and his family; if so, what was it?

(Question objected to by defendants' solicitors as irrelevant, incompetent, and immaterial.)

A. 9. I would not now pretend to give any conversation I
366 may have had with Mr. Kellam at any time, but am sure that he has at different times told me that his wife, when a girl, lived with Mr. Keith.

Q. 10. Were you ever present at Mr. Keith's residence when Mr. and Mrs. Kellam were visiting there?

A. 10. Frequently.

Q. 11. You may state, if you know, how they were received and treated by Mr. Keith when visiting at his house?

A. 11. In the same manner that he treated his other relatives when they visited him.

Q. 12. You may state whether or not you know anything about a correspondence had by Mr. Keith with Edward P. Kellam in regard to a railroad going through his tract of land lying near Topeka, Shawnee Co., State of Kansas. If so, how do you know it, and what was it?

367 A. 12. About three years ago Mr. Keith handed me a letter from Mr. Kellam to the effect that some railroad company was endeavoring to get the right of way through his land near Topeka and asked me to answer it and to tell Kellam to employ counsel to prevent them going through. I do not remember whether that was all the instructions he gave me at that time or not, but I answered the letter to Mr. Kellam as requested. I at that time was keeping Mr. Keith's books and did most of his correspondence as dictated by him. I think I received some letters from Mr. Kellam direct to myself concerning the same matter, as I frequently received letters from him concerning the taxes and other matters in connection with the land.

Q. 13. Did you hear or know in what manner Mr. Kellam acted in regard to the passing of the railroad through the land, or what he did other than what you have just stated, or what was finally done in the matter by him?

368 A. 13. I never knew whether he did anything further in the matter, except that something over a year ago I lear-ed, either from him or from Mr. Keith, that Mr. Kellam had received some money from railroad company for damages for right of way and applied it upon the taxes due against the land.

Q. 14. State if you know, while you were acting book-keeper and secretary for Mr. Keith, Mr. Keith had an agent in Topeka caring for and in charge of said tract of land.

(Question objected to as incompetent, irrelevant, and immaterial.)

A. 14. I always understood Mr. Kellam to be Mr. Keith's agent to look after his property in Topeka, and addressed matters pertaining to the said property to Mr. Kellam at Mr. Keith's instructions, and, when Mr. Keith was absent from here to be gone any length of time, while I was keeping his books, received letters from Mr. Kellam directed to me concerning matters that needed prompt
369 attention concerning said property.

Q. 15. You may state if while acting secretary and book-keeper for Mr. Keith you know whether or not Mr. Keith relied upon Mr. Kellam in all matters brought to his attention relative to said land, of his, Kellam, in managing the same.

(Question objected to as incompetent, irrelevant, and immaterial.)

A. 15. All matters concerning said property which I know anything about was transacted through Mr. Kellam by Mr. Keith's instructions.

Witness desires to state that many letters from Mr. Kellam which were handed to witness to answer by Mr. Keith went into the waste basket after being answered, and those preserved and offered in evidence here were hunted up after Mr. Keith became dissatisfied with the sale; that in the beginning no effort was made by witness to save any of them.

370 Q. 16. How long did you act as book-keeper for Mr. Keith, and when did you cease to do so?

A. 16. From October, 1882, constantly until about 1st September, 1884, and irregularly for several months after that.

Q. 17. Are you interested in the result of this controversy?

A. 17. Only as attorney for Mr. Keith. I have attended to Mr. Keith's law business in North Platte for several years.

Q. 18. In case of Mr. Keith's dying intestate who would inherit his property?

(Objected to as incompetent, immaterial, and not proper cross-examination.)

A. 18. I have a child 4 years old next February, who is the grandchild of Mr. Keith. I know of no other children or grandchildren, and under our law this child would inherit his property.

WM. NEVILLE.

Subscribed in my presence and sworn to before me by said William Neville this 20 day of October, 1887.

{ Notarial Seal W. N. Cartwright, Lincoln County, Nebraska. Commission expires May 23*th*, 1893. }

W. N. CARTWRIGHT,
Notary Public.

371 And also the said LESTER EELLS, being about the age of 37 years and having been by me first cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in the matter of controversy aforesaid, I did carefully examine the said Lester Eells, and he did thereupon depose, testify, and say as follows, viz:

Q. 1. State your name, age, residence, and occupation.

A. 1. Lester Eells; North Platte, Nebraska; real estate and insurance; age, 37.

Q. 2. How long have you resided in North Platte?

A. 2. 13 years the 13 day of December.

Q. 3. Are you acquainted with defendant Edward P. Kel-
372 lam and plaintiff, Morrell C. Keith; and, if so, how long have you known them?

A. 3. I am; have known Keith about 14 years; have known of Mr. Kellam as long as I can remember; have known him since 1879. I could not state just how long.

Q. 4. Did you ever keep Mr. Keith's books for him and attend to his business for him; and, if so, how long, and when?

A. 4. From December, 1874, until, I think, February or March, 1879. I am not posative; it was along about that time, anyway.

Q. 5. Who, if any one, attended to Mr. Keith's business in Topeka, Kansas, concerning his property interests there while you were his book-keeper here?

A. 5. All I know is this: That we used to receive letters from Mr. Kellam relative to taxes due on land owned or that he was interested in—I never knew which—and that I remitted the taxes to Mr. Kellam by instructions from Mr. Keith.

373 Q. 6. State whether or not you have ever had any conversation concerning this Topeka land of Mr. Keith's with Mr. E. P. Kellam; and, if so, about when, and what was the conversation.

(Question objected to as incompetent, irrelevant, and immaterial.)

A. 6. It was January or February, 1885. I think I was in Topeka latter part of January or fore part of February visiting Mr. Kellam and his family, and he talked with me about this land of Mr. Keith's. He was talking of trying to buy it off him, and I think stated the price he had offered Mr. Keith for the land, which was $500 an acre. I think that was the price. Of course I would not be posative as to that, but that is my recollection of it, and he drove me out to look at the land, and wanted to know what I thought of it and what it was worth. I am a little ahead of my story. He was, I think he said, talking about buying it, and drove me out to seee — land
374 *land* and what I thought of it. I answered him in this way, that as I was not acquainted with value of property in Topeka I could not say anything in regard to it. I never was in the town before in my life. He had made Mr. Keith an offer for the land, and afterwards he told me what he had offered for it, and said he thought he had offered him a good big price for it.

Cross-examination:

Q. 7. Upon your return to North Platte after your visit to Topeka did you inform Mr. Keith that you had seen his land?

A. 7. Yes, sir.

Q. What did you say to him?

A. 8. I asked him why he did not sell his land to Ed. Kellam. He said he thought it was worth more money, and that he did not have to sell it. That is about the substance of the conversation; that is about what he said to me, as near as I can recollect.

375 Q. 9. In that conversation with Mr. Keith was the price that Mr. Kellam told you he offered for the land referred to by you and Mr. Keith?

A. 9. I don't remember. I supposed he knew the price. I told him Ed. had offered a fair price, I thought, and he thought it was worth more money; that was the conversation.

Q. 10. Did he state how much he thought it was worth?

A. 10. No, sir.

Q. 11. Did you ever have any other conversation with Mr. Keith in regard to the price of this land?

A. 11. No, sir.

Redirect:

Q. 12. In your conversation with Mr. Keith after you returned from Topeka you may have stated to him the price which Mr. Kellam said he had offered, may you not?

376 A. 12. I can't recollect about that. I may have and I may have not.

LESTER EELLS.

Subscribed in my presence and sworn to before me by said Lester Eells this 20 day of October, 1887.

{ Notarial Seal W. N. Cartwright, Lincoln County, Nebraska. Commission expires May 23*th*, 1893. }

W. N. CARTWRIGHT,
Notary Public.

377 UNITED STATES OF AMERICA, *District of Kansas*, } *ss:*

STATE OF NEBRASKA, *County of Lincoln.* }

I, W. N. Cartwright, notary public, duly appointed, commissioned, and qualified and by the laws of the United States, do hereby certify that the reason for taking the foregoing deposition- is and the fact is that the testimony of the said witnesses is material and necessary for the plaintiff in the cause in the caption of the said deposition- named, and that the said witnesses live and did live at the time of taking said deposition- in North Platte, in the State of Nebraska, the same being at a greater distance than one hundred miles from Topeka, in the State of Kansas, the place of trial of the said cause, to wit, more than — miles therefrom.

I further certify that, as appears by the stipulation hereto attached, due notice of the time and place of taking the said deposition- and the names of the witnesses to be examined was given.

I further certify that on the 19 day of October, A. D. 1887,
378 at the hour of ten o'clock in the forenoon, I was attended at the office of Wilcox & Williams, in North Platte, county of Lincoln and State of Nebraska aforesaid, by E. S. Quinton, of Quinton and Quinton, solicitors for plaintiff, and Charles B. Smith, of Rosington, Smith and Dallas, solicitors for defendants, and the wit-

nesses, viz., Morell C. Keith, William Neville, Lester Eells, who were of sound mind and lawful age; and the said witnesses were by me carefully examined and cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, and the depositions were by me reduced to writing in the presence of the witnesses and from their statements, and after carefully reading the same to the witnesses they subscribed the same in my presence. I have retained the said deposition- in my possession for the purpose of sealing up and directing the same, with this certificate of the reasons aforesaid for taking said deposition-, with my own hand to the court for which the same were taken.

379 And I do further certify that I am not of counsel nor attorney for either of the parties in said deposition- and caption named or in any way interested in the event of the said cause named in said caption.

In testimony whereof I have hereunto set my hand and seal this 20 day of October, 1887.

{ Notarial Seal W. N. Cartwright, Lincoln County, Nebraska. Commission expires May 23*th*, 1893. }

W. N. CARTWRIGHT,
Notary Public.

380 *Fees of Officer.*

Taking and certifying depositions, 13,200 words	26 40
Administ-ring oath to witnesses, three	30
Filing exhibits, ten	1 00
Postage	1 84
	$29 54

NORTH PLATTE, NEBRASKA, *October* 24, '87.

I hereby certify that foregoing fees were duly paid to me by Morell C. Keith, plaintiff in aforesaid action.

{ Notarial Seal W. N. Cartwright, Lincoln County, Nebraska. Commission expires May 23*th*, 1893. }

W. N. CARTWRIGHT,
Notary Public.

381 In the Circuit Court of the United States for the District of Kansas.

MORRELL C. KEITH, Complainant,
vs.
EDWARD P. KELLAM and C. K. HOLLIDAY, Defendants.

On the application of said complainant, by his solicitors, it is hereby by me ordered that the testimony to be adduced on behalf of said complainant shall be commenced at United States circuit — room, in the city of Topeka, on the 5th day of October, 1887, at the hour of 2 o'clock p. m., and proceed thereafter as ordered.

It is further ordered that the defendants' solicitors be notified of this order by service of notice three days before said day of hearing.

L. S. WILSON,
Examiner in Equity for said District.

382 In the Circuit Court of the United States for the District of Kansas.

MORRELL C. KEITH, Complainant,
vs.
E. P. KELLAM and C. K. HOLLIDAY, Defendants.

Testimony taken on the part of the complainant, under the 67th rule of practice for the courts of equity of the United States, as amended, by Lester S. Wilson, examiner in equity, at the office of Williams & Dillon, in the city of Topeka, Kansas, on Saturday, November 26th, 1887, at 3 o'clock p. m.

Present: A. Bergen and E. S. Quinton, solicitors for complainant; John T. Morton, solicitor for defendants.

383 GEORGE W. WATSON, a witness on behalf of the complainant, being by me first carefully examined, cautioned, and solemnly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

Direct examination—questions by Mr. QUINTON:

Q. Mr. Watson, it has been stated in evidence here for the defense that this offer that you have testified to that you made to E. P. Kellam for the Keith tract of land was some time after the 20th of September or in October. I will ask you if that is a fact.

A. No.

Q. How do you know that it is not a fact?

A. I know that it was some time prior to the date that the deed from Keith to Holliday was put on record.

Q. You may state, Mr. Watson, who authorized you and what conversation you had at the time you made the offer to Mr. Kellam and the exact time, if you can, of the offer.

Objected to as incompetent and as calling for *for* a conversation with a third person in the absence of both defendants.

A. I was *ua*-horized by Mr. Blood, a member of the Continental Investment Company, to make an offer of $90,000 for their company for the Keith tract. That offer was made something near or about a month before the deed from Keith to Holliday was put on record.

Q. Did you make the offer to Mr. Kellam that you referred to upon the same day that you were authorized to by Mr. Blood?

A. That is my recollection—that it was the same day.

Q. Did you report to Mr. Blood whether or not you had made that offer?

A. I did a day or two after that—either the same day or a day or two after.

Q. When you reported to Mr. Blood did you inform him
384 of what amount of money or what money you would need to pay on it?

Objected to as incompetent and irrelevant.

A. My authorization to make an offer on the tract included a cash payment of $30,000—I think it was $30,000—$25,000 or $30,000. When I reported to Mr. Blood that the offer had been made I asked him if the money was ready in case the offer was accepted. Mr. Blood stated that he would have the money ready in a few days; something to that effect. I can't just remember what the conversation was; that was the substance of it.

Cross-examination—questions by Mr. MORTON:

Q. Why did you make your offer to Mr. Kellam?

A. I made my offer to Mr. Kellam because I understood he was agent for the tract.

GEO. W. WATSON.

385 E. L. BLOOD, a witness on behalf of the complainant, being first carefully examined, cautioned, and solemnly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows.

Direct examination—questions by Mr. BERGEN:

Q. Was it after the 20th of September, 1886, that you authorized George W. Watson to make an offer to purchase the Keith tract of land for you or the company with which you are connected?

Objected to as incompetent and irrelevant.

A. No, sir.

Q. Do you know the day on which you authorized him to make an offer?

Same objection.

A. Not the exact date. I know it was prior to the 20th of August, 1886.

Q. How many days prior to the 20th day of August was it, if you know?

Same objection.

A. Well, it must have been from five to ten days. It was long enough for me to write to Chicago and inform parties there that I desired a deposit of $25,000 made in the bank at Chicago subject to my draft through the First National Bank of Topeka. Advices were received here on the 20th of August that the deposit was made.

Q. Did those advices come by letter?

A. Yes, sir.

Q. Had you previously requested it by letter sent to Chicago?
A. Yes, sir.
Q. Therefore you can say that you know that it was from five to ten days before August 20th?
A. Yes, sir; it was a sufficient length of time prior to the 20th to permit a letter written by me to reach Chicago, and the
386 money procured and put on deposit, and a letter advising me of that fact to reach Topeka from Chicago. The bank was also notified, and I was notified from the bank.
Q. Had Mr. Watson reported to you that he had made an offer before you wrote the first or this letter requesting the money to Chicago?

Objected to as incompetent.

A. Yes, sir; he informed me that he had made it the same day he did make it. He said there were other parties seeking to get the land and I must be prepared with my money in case the offer was accepted.

Answer objected to as incompetent and hearsay.

Q. For what purpose did you have that money, Mr. Blood?
A. I had it deposited at that time for the purpose of buying that land in case the offer was accepted.
Q. What tract of land?
A. The Keith tract.
Q. How much money?
A. $25,000.
Q. How long did that remain here subject to your order?
A. I checked it out the 27th of August.
Q. For other purposes?
A. For the purchase of other land.

E. L. BLOOD.

387 D. A. MOULTON, a witness on behalf of the complainant, being first carefully cautioned, examined, and solemnly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

Direct examination—questions by Mr. BERGEN:

Q. Are you cashier of the First National Bank of Topeka, and were you so during all the month of August, 1886?
A. Yes, sir.
Q. I will ask you whether as such cashier you received the letter now handed to you; and, if so, when?
A. I received the letter, as cashier of the First National Bank of Topeka, August 20th, 1886.
Q. Is the letter kept as one of the files of the bank?
A. It is.
Q. Might it be desirable and would you prefer to keep it in your records?
A. We should prefer to keep it on our records; yes, sir.

Q. Has the letter been exhibited to counsel for both complainant and defendant-?

A. It has.

Q. Will you please read to the examiner the whole of that letter, to be copied?

Objected to as incompetent, irrelevant, and immaterial.

Counsel for plaintiff here asks defendants' counsel if he objects to the evidence because that, the original, letter is not attached?

To which defendants' counsel answers that he does not.

Mr. Moulton, then, will please read to the examiner the letter.

388 WITNESS: It is as follows: "First National Bank of Chicago, August 18th, 1886. To First National Bank of Topeka, Kansas. Dear Sirs: We desire to notify you that we this day credit your account $25,000 for use of Mr. Z. Dwiggins. Yours respectfully, H. R. Symonds, cashier."

Q. To whom did you credit this $25,000?

A. On August 20th credited to the Continental Investment Company, Topeka, Kansas.

Q. What person at Topeka is the manager of the affairs of the Continental Investment Company?

A. Mr. E. L. Blood, secretary.

D. A. MOULTON,
Cashier First Nat'l Bank of Topeka, Kansas.

389 E. S. QUINTON, a witness on behalf of the complainant, being first carefully examined, cautioned, and solemnly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

Direct examination—questions by Mr. BERGEN:

Q. Are you one of the attorneys for the complainant, Morrell C. Keith?

A. I am.

Q. Did you, for M. C. Keith, to-day make any tender in this suit to the defendants or their solicitors? And, if so, state what you did.

A. I did, and in the presence of M. C. Keith, in the Bank of Topeka, on November 26th, 1887, tender and in my hands extended to Judge John T. Morton, as attorney for the defendants, C. K. Holliday and E. P. Kellam, twenty-eight thousand and twenty dollars as a return of the twenty-five thousand dollars and interest paid by C. K. Holliday for the deed of Morrell C. Keith to him, dated August 19th, 1886, and for the taxes of 1886 and the interest thereon, paid by defendants on the lands in controversy, and at the same time tendered to him a return of two notes, each for seventeen thousand five hundred dollars, and the mortgages securing the same, made by C. K. Holliday and wife to M. C. Keith, and releases of said mortgages, duly executed and acknowledged by the complainant, M. C. Keith, all of which I then held in my hand and extended to him.

Q. What reply did Judge Morton make?
A. He refused; said he would not accept the tender.

E. S. QUINTON.

390 I, Lester S. Wilson, examiner, duly appointed by the circuit court of the United States for the district of Kansas, do hereby certify that on the day named in the depositions hereto annexed I was attended at the office of Williams & Dillon, in the city of Topeka, Kansas, by the counsel and witnesses aforesaid; that the said witnesses were duly sworn and examined, and that the depositions were reduced to writing and read by the witnesses respectively and by them respectively subscribed in my presence.

Dated November 26th, 1887.

LESTER S. WILSON, *Examiner.*

Examiner's fees, $5.00.

391 In the Circuit Court of the United States for the District of Kansas.

MORRELL C. KEITH, Complainant,
vs.
E. P. KELLAM and C. K. HOLLIDAY, Defendants.

Testimony taken on the part of the complainant, under the 67th rule of practice for the courts of equity of the United States, as amended, by Lester S. Wilson, examiner in equity.

WEDNESDAY, *October 5th*, 1887—2 o'clock p. m.

Present: A. Bergen and E. S. Quinton, counsel for complainant; C. B. Smith and John T. Morton, counsel for defendants.

392 J. B. BARTHOLOMEW, a witness on behalf of the complainant, being by me first carefully examined, cautioned, and solemnly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

Direct examination—questions by Mr. E. S. QUINTON:

Q. State your name.
A. J. B. Bartholomew.
Q. Where do you reside?
A. Topeka, Kansas.
Q. What is your business?
A. Real estate.
Q. How long have you been engaged in the business in the city of Topeka?
A. About five years.
Q. Were you acquainted with the value of property, Mr. Bartholomew, in the city of Topeka in the months of July and August—well, during the year 1886?
A. Well, I should say I was.
Q. I will ask you, Mr. Bartholomew, if you are acquainted with

the defendants in this action, Edward P. Kellam and Cyrus K. Holliday.

A. Yes, sir; I know the gentlemen.

Q. Do you know the tract of land commonly known as the Keith land, being the east half of the southeast quarter of section 25, in township 11 south, of range 15 east, of the sixth principal meridian, and also a part of the east half of the northeast quarter of the same section?

A. Yes, sir; I know the tract.

Q. And also the six and one-half acres immediately north of that, described as follows: Commencing at the southeast corne- of said northeast quarter, and running thence north 13 rods, thence at right angles west one-quarter of a mile, thence at a right angle south 13 rods, thence at a right angle east to the point of beginning?

A. Well, I know there is a small piece above the 80. I do not know the legal description there.

393 Q. I will ask you, Mr. Bartholomew, if you knew and were acquainted with this piece of land in the months of June, July, and August, 1886?

A. Yes, sir.

Q. What was the value, Mr. Bartholomew, of that piece of land in the month of June, 1886?

A. Well, those things had a speculative value about that time, but we had some customers that I think we could have sold the land for from seventy-five thousand to eighty thousand dollars.

Q. Was the land worth seventy-five thousand or eighty thousand dollars, in your judgment, at that time?

A. I think we could have sold it for about that figure during the month of June.

Q. What was this land worth, if you know, in the month of July, 1886?

A. Well, I presume it was worth possibly a little more. It would have sold for a little more in the month of July. I was away from home at the time and got home in August, but when I returned that class of properties were very active and possibly would have sold for a little more than that.

Q. What was it worth in the month of August?

A. Well, it would have brought very easily one thousand dollars an acre—that is, I am speaking of the general feeling in the market; possibly a little more than that. Later in the season I had a pool that would have given one hundred and twenty thousand dollars for the tract.

Q. What time was that, Mr. Bartholomew?

A. I think that was in October, 1886.

Q. Do you know, Mr. Bartholomew, at that time who had control or charge of that property?

A. Well, I suppose Mr. Kellam had rental charge and possibly the sole agency.

Q. Did you know that he had the sole agency, Mr. Bartholomew?

Objected to as incompetent, irrelevant, and immaterial.

394 A. I cannot say that I did know that.

Q. Did you ever during the year 1886 try to purchase that piece of land, Mr. Bartholomew?

Same objection.

A. Well, we had some customers for it, just as we have—make offers for property in our line, being in the commission business.

Q. At what time of the year was that. When was that in 1886, the first time?

A. Well, it was during the early part of 1886; probably May or June; something like that.

Q. Did you seek to buy it at that time?

A. Well, we sought to get a price for customers.

Q. To whom did you go to purchase that piece of land?

A. I went to Mr. Kellam.

Q. Did he at that time represent to you that he was acting as the agent for the sale and control of that piece of land?

A. Well, I could not say that he made that representation. I was under that impression, because he had always had charge of the property for rents, and when letters were addressed to Keith there was no attention paid to them or none to ours.

Q. Did you get that impression from anything that he said to you at that time that he was acting as agent?

A. He told me that he could not put any price on it; that it was not in the market for sale.

Q. Did he say anything about who would have the sale of it or who would have the control of it?

A. Well, I think I am safe in saying that if it was for sale that he would have the sale of it.

Q. He remarked that to you at that time, did he?

A. And I told Mr. Kellam on one occasion that if he would give it to us for sale we would divide commissions with him. That was courtesy between one agent and another where any one controlled a piece of property.

395 Q. What reply did Mr. Kellam make to that?

A. I don't know that he gave me a positive answer, yes or no.

Q. Did he say anything?

A. That I do not know.

Q. Did you make him an offer at any time, Mr. Bartholomew, for that piece of land?

A. No; I don't think there was any offer made by——

Q. Was anything said about the value of the land between you and Mr. Kellam?

A. No; I think not as to the value, because we were simply seeking the land to sell as commission men.

Q. Did he ask you to make an offer for that piece of land?

A. No; I think not, because he said the land was not for sale; it was not on the market.

Q. Did you tell him that you had a purchaser for it?

A. Well, I presume that I told him we had customers that we might sell it to if it was on the market at market prices.

Q. That, you say, was some time in May or the first of June?

A. I think it was about that time.

Q. When did you see him again about the purchase of that land?

A. Well, it was in the early part of 1886—two or three weeks after that.

Q. In this first conversation that you had with him did you say anything to him about writing to Mr. Keith?

A. Not that I recollect of.

Q. What took place in the second conversation that you had with him in regard to the purchase of this land, Mr. Bartholomew?

A. Well, the conversation was similar. I asked if it was on the market and if there was any price on it.

Q. Do you remember what month that was?

396 A. In June.

Q. The first or latter part of June?

A. It was probably from the first to the middle.

Q. What answer did he make to that?

A. Well, my recollection is that he said it was not for sale.

Q. Mr. Bartholomew, did he represent himself to you in either one of those conversations as being the -gent of Mr. Keith in the control of that property?

A. I don't know that he did.

Q. Did he give you to understand the same from anything that was said?

Objected to as incompetent, irrelevant, and immaterial.

A. Well, I can't say that I had from what he said. I assumed that he was the representative, as he had been the renting agent for years before.

Q. Did you make him an offer at this second conversation, Mr. Bartholomew, for that property?

A. No; I think there was no offers, because these were customers of ours that we did not want to expose if the land was for sale.

Q. Did he ask you if you had any offer to make?

A. That I do not know, because he stated to me that the land was not for sale. That was the impression that we got, and Mr. Kellam not having it for sale I wrote to Mr. Keith late in the month of June, but got no reply. I went away the first of July and did not get back until some time in August.

Q. Did you have a conversation with him in August in regard to the purchase of the property again?

A. Possibly the latter part of August.

Q. Did you make him an offer for it at that time?

A. Well, when I went to see him on that occasion he said

397 the property was sold.

Q. What conversation did you have with him at that time, Mr. Bartholomew?

A. Well, when he said the property was sold I believe I asked him who the purchasers were, and he said the matter was in the

work, and I did not trespass upon his business secrets, as if a man should come to me and ask me who my customers were I should not feel like telling him.

Q. Were you buying this land yourself at that time?

A. No, sir.

Q. Did you have a purchaser for it at that time?

A. We had some parties that we thought we could sell the land to if we had it on our books for sale.

Q. Were you given any price or authorized to offer any particular sum for the land?

Objected to as incompetent, irrelevant, and immaterial.

A. Well, the price that we thought we could obtain from these customers was about seventy-five thousand dollars. There was two or three of them interested in it, and they intimated that if we had it on our books at that price they would take it.

Q. I believe you said you were acquainted with the value of property here at that time, Mr. Bartholomew, in August, 1886?

A. Yes, sir.

Q. What was the value of that land in August, 1886?

A. Well, there was a speculative value in that class of property.

Q. That was not the question I asked you. What was the value of that property in 1886, if you know?

A. I think in the state of the market then we could have gotten from eighty-six to one hundred thousand dollars for it the last of August.

398 Q. You think that was the market value of the property at that time, do you?

A. I think we could have sold it at a figure within that limit; I think I am safe in saying so.

Q. That being so, Mr. Bartholomew, what would you say was the fair market value of that property at that time?

A. Well, I should say one thousand dollars an acre.

Cross-examination—questions by Mr. C. B. SMITH:

Q. That last value that you place upon this property was in the last part of August, 1886, was it?

A. Yes, sir.

Q. Had there been a sudden rise in property in the vicinity of the city of Topeka during the month or two prior to August?

A. Well, there had been.

Q. More of a speculative value was placed upon property at that time than the real value of the property itself, was it not?

A. Well, there was more of a speculative feeling.

Q. What do you fix the value of this property at in June, the first of June, 1886?

A. Well, some time in the month of June we had some customers that led us to believe that we could sell it for about seventy-five thousand dollars if we could get it upon the books upon such terms as they might want to buy.

Q. What were the terms that they wanted to buy on?
A. I think about one-third cash.
Q. And the b-lance on deferred payments?
A. Yes, sir.
Q. What was the real value of this property outside of the speculative value attached to it on the 1st of June, 1886?
A. Well, the relative value of a thing is what it will bring.
Q. What could it have been sold at for cash on the first of June, 1886?
399 A. Well, a cash price would be very close to a figure where one-third cash is paid; the discount would not be very heavy on deferred payments on that class of property.
Q. Well, what would be the market value in Topeka on this piece of property on the first of June, 1886?
A. I think we could have sold it for seventy-five thousand dollars on the first day of June if we had been authorized to sell it.
Q. One-third cash?
A. Yes, sir; I think so.
Q. How much did that property increase in value during the month of June, 1886?
A. Well, I don't know as I could place the increase during that time; as I stated before, there was a speculative feeling in the market and everything was advancing, and the ideas of purchasers, as well as those of sellers, were at high points.
Q. How long did this speculative feeling last in the community?
A. Well, I suppose I might say it has been continued to the present time, in a degree.
Q. When did it commence?
A. Well, I think it began in the early part of 1886.
Q. Prior to June, 1886, was there any market for the sale of a piece of property of this character in the city of Topeka at any such price?
A. Yes; I think so; I think there was.
Q. What was the market value of this property in May, 1886?
A. Well, possibly we could reach as far back as the latter part of May at the figure I name; all those gentlemen were here in May that were forming this pool.
Q. What pool do you refer to?
A. The customers that I had in view of selling this if we
400 could get it at a price they thought was good.
Q. Were they seeking to purchase property for speculation in the vicinity of Topeka?
A. Yes, sir.
Q. What time did you write to Mr. Keith?
A. I think it was the latter part of June.
Q. 1886?
A. Yes, sir.
Q. Why did you write to him?
A. Well, because I did not get any price from Mr. Kellam, and I wrote to him that I had called on Kellam and he had not given me

any price, and if it was for sale at market prices that I thought I could find him a purchaser.

Q. What date in June was this?

A. That was on the 26th of June.

Q. Did you make him an offer for the property at that time?

A. I made no offer.

Q. Did you tell him that you had called upon Kellam and he had stated to you that he was not authorized to sell?

A. Yes, sir.

Q. And in pursuance of that statement you wrote directly to Mr. Keith as the owner of the property?

A. Yes, sir; I wrote to Mr. Keith.

Q. Did you write to him for the reason that Mr. Kellam had said that he had not the property for sale?

A. Yes, sir.

Q. Did you hear from Mr. Keith.

A. I never had any reply.

Q. From whom did you obtain the address of Mr. Keith?

A. I do not know. I asked some of the old citizens here. I learned that he had been an old resident of Topeka, and I made inquiry of several of them. I have forgotten who they were.

401 I think Mr. Gage, if I am not mistaken, gave me his address as North Platte, Nebraska, and that is where I addressed him.

Q. Was this letter written to Mr. Keith prior or subsequent to the second interview that you had with Mr. Kellam?

A. It was after the second interview.

Q. Was it in pursuance of the information that you derived from Mr. Kellam at both of these interviews that caused you to write this letter to Mr. Keith?

A. Yes, sir; he stated that he had not the property for sale, and we thought we would go to the owner direct.

Q. Did he tell you who the owner was?

A. No; he did not.

Q. You knew who it was?

A. We knew that from the history of the case.

Q. I wish you would state what you said to Mr. Keith in this letter.

A. I just stated in the usual formal letter that we were handling real estate on commission, and that we had been to Kellam on one or two occasions and he said that it was not for sale, and we thought it was best to address the owner in such cases, and if he had a price on it that was within the market price so that we could effect a sale to give us that.

Q. Did you tell him what you considered the market price to be?

A. I did not state any price.

Q. You have referred in your direct testimony to Mr. Kellam having this Keith property for rent. To whom has Mr. Kellam ever rented the property?

A. That was my general knowledge of those people renting cattle pasture. I think one or two of them in Potwin place had

cattle in there; at least, that is my remembrance of their statements to me.

402 Q. That is the only rental, then, that you refer to in your direct examination?

A. Yes, sir; that is what I had in my mind, that he had charge of it for pasture purposes for two or three years.

Q. You have never heard of Mr. Kellam offering to rent this property to any person or persons?

A. No, sir; only as a pasture or feed lot.

Q. Simply permitting people to pasture their cattle there upon this property?

A. Yes, sir; that was my understanding.

Q. That is the only charge of the property that you know of Mr. Kellam having, is it not?

A. That is all, and I do not know that only from hearsay, as I have stated.

Q. The general rumor that he was permitting people to pasture their cattle upon this property?

A. That is all the information that I had as to his being the agent.

Q. He never told you he was the agent for the property in any respect, did he?

A. I don't know that he did.

Q. He never made any statement to you about it?

A. I think I assumed that just from this general rumor that he had charge of it for pasture purposes.

Q. You never knew of Mr. Kellam offering this property for sale, did you?

A. No, sir.

Q. But it was in pursuance of the information that you derived from these various parties that Mr. Kellam was permitting people to pasture cows upon this land that caused you to go to him to ascertain whether the property was in his hands for sale, was it not?

403 A. I think he told me upon one occasion that he had charge of the property for that purpose. I had some sheep in Potwin place and they got over in his pasture, and I think I had occasion to see him at that time, and he told me he had charge of it in that way.

Q. Do you know of any property being sold in the vicinity of Topeka comprising any such tract of land as the land in litigation, about the times you have mentioned in your testimony?

A. At the price, you mean?

Q. Yes; at the price.

A. Yes, sir; I sold some myself.

Q. When did you sell it?

A. I sold the Horne track at about $1,500 an acre. I think it was in May, the early part of May.

Q. That is on the line of the 6th-street street-cars, is it not?

A. It is north of Eighth, running from Eighth avenue north to the Captain Johnson tract.

Q. Lying between the 6th and 10th street street-car lines, is it not?

A. Yes, sir. Well, the east line is the west terminus of both lines.

Q. Is the Dan. Horne tract nearer to the center of the business portion of Topeka than the Keith tract?

A. It is about the same distance, I think.

Q. How many acres was there in this Dan. Horne tract?

A. It was but a small tract—eight or nine acres, I think.

Q. Well, were there any buildings on it?

A. Yes, sir; there were buildings on it.

Q. The buildings were sold with the property?

A. Yes, sir; they were included.

Q. There are several additions to the city lying beyond this Dan. Horne tract, were there not?

404 A. No; nothing beyond that. The Martin tract is beyond Martin's meadows.

Q. Do you know of a tract comprising 70 or 80 acres of land being sold in May, June, or July, 1886, for any such value as you have fixed to the value of the Keith tract?

A. No; I don't think there were any sold about that time.

Q. The principal rise in property of this character occurred, did it not, after July and August, 1886?

A. I think there was some rise after July, perhaps.

Redirect examination—questions by Mr. QUINTON:

Q. Mr. Bartholomew, what kind of land was this? How does it lay connected with the city, considered in regard to other land lying around there, for the purposes for which it could be used?

A. Well, it was considered a very desirable tract.

Q. A very desirable tract, wasn't it?

A. Yes, sir.

Q. State whether or not, Mr. Bartholomew, the city had not been built up or houses had not been built up on three sides of this—the east, south, and west sides of it.

A. Well, I think it is built up on three sides or a large portion of the east side and altogether on the west side. It is built up altogether on the south and west sides and a portion on the east.

Q. Was not that true, Mr. Bartholomew, in the months of July and August, 1886?

A. Well, not so fully built up on the west side. Potwin place was not so filled up as it is at the present, although it was pretty well developed at that time.

Q. Was not the Potwin place composed at that time of a great many nice residences—in July and August, 1886?

A. Yes, sir; they were principally so.

Q. That is immediately west and adjoins this on the west, does it not?

405 A. Yes, sir.

Q. This tract of land lies between Potwin place, does it not, and the city?

A. Yes, sir.

Q. How does the Dan. Horne tract of land, that you speak of selling at $1,500 an acre, compare with this Keith tract of land?

A. Well, I should say that the south 20 or 30 acres of this tract would be as desirable for speculation as the other tract.

Q. You speak of houses being on the Horne tract?

A. There was one house on it.

Q. Just one house?

A. Yes, sir.

Q. Is that all?

A. Yes, sir.

Q. State whether or not it is not a fact that the residences of Potwin place at that time—in July and August, 1886—were not the best class of residences in Topeka, the number of them that were there?

A. I think the number of them would average the best in the city proper.

Q. You may state whether or not those residences in Potwin place were not built, the most of them, during the summer of 1886.

A. Yes, sir.

Q. The most were built in 1886?

A. Yes, sir; we had four houses, I think, on the opening of spring, in the Potwin place, of that year.

Q. How large a tract of land is the Potwin place?

A. 70 acres.

Q. Do you know who the agent was for the Potwin place in selling off the lots in that place?

A. I have been the manager of that.

Q. Did you make all the sales of Potwin place?

406 A. Yes, sir.

Q. You said, Mr. Bartholomew, that when you interviewed Mr. Kellam in June that he informed you that the property was not for sale?

A. Yes, sir.

Q. Now, Mr. Bartholomew, you answered, in answer to a question asked you by counsel for complainant here, that he told you he was not authorized to sell the property. Which one of those answers did he make to you—that the property was not for sale, or that he was not authorized to sell it?

A. I do not know as I could say that he made either. He said the property was not for sale.

Q. I don't think you understand the question asked by counsel. I want you to remember, if you can, exactly what he did say at that time.

A. He said the property was not for sale.

Recross-examination—questions by Mr. SMITH:

Q. There were no considerable amount of improvements in the way of houses erected on the Potwin place in the month of June, 1886, was there?

A. Yes; quite a number of houses; I should say twenty building and under way, probably, at that time.

Q. On the whole 70 acres?
A. Yes, sir; I think so.

J. B. BARTHOLOMEW.

407 J. B. BARTHOLOMEW, a witness for the complainant, was here recalled and testified as follows:

Direct examination—questions by Mr. QUINTON:

Q. I want to ask you, Mr. Bartholomew, if you sought to purchase this land in October, 1886, being the Keith tract of land, described as the east half of the southeast quarter of section 25, in township 11 south, of range 15 east, of the 6th principal meridian, and also a part of the east half of the northeast quarter of the same section—in all, eighty-six and one-half acres?

Objected to as incompetent, irrelevant, and immaterial

A. We had a customer for it, or a little syndicate that was willing to buy it at a price.
Q. Did you go to see any one then for the purpose of buying it at that time?
A. Well, I went to see Mr. Kellam to get the sale of it.
Q. State the conversation you had with Mr. Kellam at that time, Mr. Bartholomew.

Objected to as incompetent, irrelevant, and immaterial.

A. Well, the price fixed by Mr. Kellam at that time was one hundred and twenty thousand dollars.
Q. Did you buy the land at that time?
A. No, sir; we were not buying the land. We were only seeking the land on our books as agents. We had some customers that were negotiating with — for the purchase of it. We were acting as his agent, in so far as that went.
Q. Did you find a purchaser for the land at that price?

Objected to as incompetent, irrelevant, and immaterial.

A. Well, we had a little syndicate that would have given that price for it.
Q. How did it come that you did not purchase the land at that time?
408 A. Well, there was a little difference of opinion as to commissions—I believe was the cause of the sale not going through, so far as we were concerned.
Q. You may state, Mr. Bartholomew, all the reasons why the transactions connected with the sale of that land did not go through at that time, as near as you can recollect.

Objected to as incompetent, irrelevant, and immaterial.

Q. State the conversation—what was said.
A. Well, do you mean in relation to the sale to these people that I refer to?
Q. Yes, sir.

Objected to as incompetent, irrelevant, immaterial, and specially objected to as to the defendant Holliday.

A. My understanding was that they were to pay us a commission on one hundred and twenty thousand dollars, if we sold it for that, and a little further along it developed that they wanted one hundred and twenty thousand dollars net, and wanted us to advance the price to one hundred and twenty-five thousand dollars on our customers, which we could not do at that period of our negotiation, and I allowed the matter to drop, as far as I was concerned.

Q. Was there any further conversation, Mr. Bartholomew, as to the terms?

A. Well, I think the terms were fifty thousand dollars cash—that is my recollection, fifty thousand dollars cash—and then Mr. Kellam came to me and said they would prefer sixty thousand dollars cash, if they were not committed at fifty thousand. I believe that was about the way. I do not recollect the details of deferred payments.

Q. What, if anything, did Mr. Kellam say the price of the land was, Mr. Bartholomew?

Same objections.

A. He gave me the price of one hundred and twenty thousand dollars.

409 Q. You may state, in connection with that, what the terms and conditions were.

Same objections.

A. I think fifty thousand was what they wanted, cash payment or first payment.

J. B. BARTHOLOMEW.

410 E. L. BLOOD, a witness on behalf of the complainant, being by me first carefully examined, cautioned, and solemnly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

Direct examination—questions by E. S. QUINTON:

Q. State your name.

A. E. L. Blood.

Q. Where do you reside?

A. Topeka, Shawnee county, Kansas.

Q. What is your business?

A. Real estate.

Q. How long have you been engaged in the real-estate business in the city of Topeka?

A. About four or five years.

Q. I will ask you, Mr. Blood, if you are acquainted with and know the Keith tract of land, commonly known as the Keith tract of land, lying northwest of here.

A. Yes, sir; I know the land.

Q. The Keith tract of land—I will read you the description:

The east half of the southeast quarter of section 25, township 11, range 15; and also the six and one-half acres immediately north of it, being part of the east half of the northeast quarter of the same section. You are acquainted with that piece of land, are you?

A. Yes, sir.

Q. Were you acquainted with the market value of property in the city of Topeka in the months of May, June, and July, in the year 1886?

A. I was somewhat acquainted with the values; yes, sir.

Q. Do you know what the market value of this piece of land was in the month of May, 1886?

A. I do not know as I can state what the market value of it was at that time.

Q. Could you state what the market value of the property was in June, 1886?

411 A. I can state what I think it was worth at that time.

Q. You may state.

Objected to as incompetent, irrelevant, and immaterial.

A. I think it was worth one hundred thousand dollars.

Q. What do you think it was worth, Mr. Blood, in the month of July, 1886?

A. Well, I think the value was about the same in July as it was in June.

Q. In August, 1886?

A. About the same. I do not think the value changed very much in those three months.

Q. I believe you stated that you were acquainted with the value of property in Topeka that year?

A. Somewhat; yes, sir.

Q. Did you ever make an offer for the purchase of that property?

A. Yes, sir.

Q. To whom did you make that offer?

A. George W. Watson, or I authorized George W. Watson to make it for me to the owners.

Q. How much did you authorize George W. Watson to pay for that land, Mr. Blood?

Objected to as incompetent, irrelevant and immaterial.

A. One hundred thousand dollars; twenty-five thousand dollars cash and twenty-five thousand dollars in one, two, and three years at seven per cent. interest.

Q. At what time was this, Mr. Blood, that you made this offer?

A. I cannot give the date; I have not kept any memorandum; it was the last of July or the first of August—the last of July or in the month of August.

Q. You know it was about that time, do you?

A. Yes, sir.

412 Q. It could not have been as late as the latter part of August, could it?

A. That I made the offer?

Q. Yes, sir.

A. Well, it might have been towards the last of August; yes; it was in the month of August that I made the offer; whether it was after the 15th or not I could not say positively now.

Cross-examination—questions by Mr. SMITH:

Q. Are you personally acquainted with this land?

A. Well, I have been on it.

Q. What was the market value of the south twenty acres of this property in June, 1886?

A. Well, I did not examine it with reference to the south 20 acres in particular. I examined it in reference to the whole tract and made my estimate on what would make about five hundred lots of the south part of it, estimating eight lots to the acre.

Q. The value that you placed upon it, then, was entirely a speculative value?

A. Well, it was with reference to laying it off and selling it out in lots—platting it.

Q. When did you make a personal examination of this property?

A. Well, I was on it several times during the months of July and August. I have been on it before, but I went on it more particularly then at the suggestion of Mr. Watson.

Q. When was it that Watson suggested it?

A. It was some time—the last of July or first of August.

Q. How did he happen to suggest to you to go and see it?

A. Well, we had had several deals and I had bought considerable property of him, and he recommended it as being a good purchase and wanted to know what I would give for it.

413 Q. Were you in a financial condition to have carried out your contract if it had been sold?

A. Yes, sir.

Q. There was a sudden increase of values in a speculative way in outside property adjacent to the city of Topeka in the months of June, July, and August, 1886, was there not?

A. Well, there was something of an increase; yes, sir. I think business men took more notice of what we call suburban property along about that time.

Q. Prior to that time there had been no large tracts sold adjacent to the city at any such prices as you have stated?

A. No, sir; I don't think there was any such tract near the city worth as much as that.

Q. The value that you place upon it was the value that you thought the property was worth to be divided into lots and sold out in parcels?

A. Yes, sir.

Q. There was no market value at this time established in the city of Topeka for this class of property, was there?

A. Well, I would not like to say that there was what I call a market value.

Q. It was not a common thing for property to be sold of that size?

A. No, sir; not a very common thing at that time.

414 J. W. FERGUSON, a witness on behalf of the complainant, being by me first carefully examined, cautioned, and solemnly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

Direct examination—questions by Mr. QUINTON:

Q. Mr. Ferguson, where do you reside?

A. In Topeka, Kansas.

Q. What is your business?

A. Real-estate business.

Q. How long have you been engaged in that business?

A. About two years or a little over.

Q. I will ask you, Mr. Ferguson, if you were acquainted with the market value of property in Topeka in the year 1886, in the months of June, July, and August.

A. Somewhat; yes, sir.

Q. Were you acquainted with what is commonly known as the Keith tract of land, being the east half of the southeast quarter of section 25, township 11, range 15 east of the sixth principal meridian, and also the six and one-half acres lying immediately north of it, being part of the east half of the northeast quarter of the same section and township?

A. Yes, sir; I know the piece.

Q. In all eighty-six and one-half acres?

A. I know the tract of land.

Q. Were you acquainted with that land or did you know about it in the year 1886, along in June, July, and August?

A. Yes, sir.

Q. What was the market value of that piece of land in the month of June, 1886?

A. Well, I could tell about what I thought it was worth.

Last answer objected to as incompetent, irrelevant, and immaterial.

415 WITNESS:

A. I considered it a bargain at one thousand dollars an acre.

Q. Did you, in the month of June, 1886, seek to purchase that piece of land?

A. I did.

Q. From whom did you seek to buy it? Whom did you go to see?

A. I saw Mr. Kellam; I do not know the first name.

Q. Is that the gentleman sitting there—the defendant in this action?

A. Yes, sir.

Q. You may state, Mr. Ferguson, what conversation you had with him at that time.

A. I called on Mr. Kellam at his office some day in June, I think it was, and asked him if he was not the agent for a certain tract of land adjoining the city on the northwest. He hesitated a little, and says, "Well, yes," and went on with a little explanation. I think he said that he paid the taxes.

Q. What else did you say to him?

A. After a little talk I asked him if the piece of land was for sale.

Q. What answer did he make to that?

A. He answered and said he didn't know whether it was or not.

Q. Did you say anything about buying it?

A. I don't remember whether there was much said at that time or not.

Q. Did you have another conversation with him?

A. Yes, sir; I had several conversations with him.

Q. When did you have the next one?

A. Well, it might have been a week and it might not have been that long after.

Q. What was that conversation? State it as near as you can recollect.

416 A. It was something like the first conversation—talking about the land, what it was worth, what I thought I could buy it for, and he also asked me if I had a purchaser.

Q. Did he state what it was worth?

A. He asked me what I thought it was worth.

Q. Did you tell him?

A. I do not recollect that I did at that time.

Q. Did he state what he thought it was worth?

A. No; he did not say at that time what he thought it was worth.

Q. Did you make him an offer for the land at that time?

A. I do not remember whether it was the first, second, third, or fourth time that I made the offer; I know I saw him frequently.

Q. Did you go to see him about the purchase of this land?

A. Yes, sir; talk about the land.

Q. Did he ever ask you to make an offer for the land?

A. Yes, sir; he did on several occasions.

Q. Did you do it—make him an offer for it at his request?

A. Yes, sir.

Q. At what time was it that he requested you to make him an offer for the land?

A. I think in the second conversation he had with me he asked me if I could make an offer; he also asked me if I had a purchaser for it.

Q. What did you tell him?

A. I do not remember whether I told him we had a purchaser or not. During one of our conversations I told him there was a gentleman here in town who had requested me to get the price on the land and *were* hunting a tract something similar to that piece.

Q. That was the second conversation?

A. Yes, sir; the second conversation.

Q. What conversation did you have with him the third
417 time you went to see him?

A. Well, they were so near together that I cannot separate one conversation from another.

Q. When was it that these conversations took place?

A. It was in the latter part of June or the first of July.

Q. Do you remember at what time you had the last conversation with him in regard to the price of the land?

A. It was about the 22nd of August.

Q. At what time, now, was it—in what conversation was it that you made him an offer for this land?

A. Well, sir, it must have been along the first week in July; the first or second week of July.

Q. What did you offer him for the land at that time?

A. I asked him if eighty thousand dollars would b-y the piece and he said it would not.

Q. Was this offer made at his request?

A. Yes; he had insisted on me making him an offer several times, and I asked him then if eighty thousand dollars would buy it.

Q. What did he say?

A. He smiled and said, "Oh, no."

Q. That was in the first week of July?

A. About the first week of July.

Q. What did you say then, Mr. Ferguson?

A. He said, "You know the land is worth more." I told him it probably was; that it was a difficult matter to say exactly what it was worth; it might be worth seventy-five thousand dollars or it might be worth one hundred thousand dollars. I told him we both knew it was a very valuable piece of property.

Q. Did you ever make him an offer on the land?

A. Yes, sir; I think I did on the 22nd or 23rd of August; about that date.

418 Q. What did you offer him for the land at that time?

A. Eighty-six thousand dollars.

Q. What answer did he make you then?

A. He said the way it came about he stopped me on the street between 4th and 5th. No, I think I stopped him. A short time before that he told me his uncle was in New York city, and that he would be here in two or three weeks. I stopped him and asked him if he had heard from his uncle lately. He said, yes, that he had, and that he could give me prices on the land before very long. This was along some time about the 20th of August.

Q. He said he would give you prices on the land pretty soon?

A. Yes; that he could make me prices on the land in a short time.

Q. Was that all he said?

A. Well, that was about all he said. Yes, he went on to say that he had expected his uncle here, but he had gone to New York city instead of coming here.

Q. Did he say anything about the title to the land?
A. No, sir; there was nothing said about that.

Cross-examination—questions by Mr. SMITH:

Q. How long did you say you had been in the real-estate business?
A. About two years.
Q. Two years now?
A. Just about two years; yes, sir.
Q. So that in June, 1886, you had been in the business about eight or nine months?
A. Just about; yes, sir.
Q. How long have you lived in Topeka?
A. A little over five years.
Q. What business were you engaged in before going into the real-estate business?
419 A. I was engaged in the loan business, buying and selling a little real estate occasionally.
Q. Where-bouts?
A. Here in the city and vicinity.
Q. The south side?
A. Well, our purchases were mostly on the east side.
Q. What part of town do you live in?
A. 324 Quincy street.
Q. Where did you live in May, 1886?
A. The same place.
Q. Are you engaged in business alone?
A. No, sir.
Q. Were you engaged in business alone in May, 1886?
A. No, sir.
Q. Who was your partner?
A. I was with J. H. Hunt & Company, real-estate and loan agents, located at 95 Kansas avenue.
Q. What were you doing with them?
A. I was connected with them, doing real-estate and loaning business.
Q. In what connection?
A. Well, I had a share of the business.
Q. What share of the business?
A. One-half of the profits.
Q. Were you a partner in the firm?
A. We considered it so.
Q. Who were the other partners?
A. Mr. Hunt.
Q. Who was Mr. Evans?
A. Mr. Evans was not known at that time in the firm.
Q. What was the name of the firm at that time?
A. J. H. Hunt & Company.
420 Q. Were you a member of the partnership of J. H. Hunt & Company?
A. We considered it so; yes, sir.

Q. Were you?
A. I was and I was not.
Q. In what respect was you not?
A. There was an understanding, but there were no written articles of agreement executed.
Q. What was the mutual understanding?
A. That I was the company of the firm at that time.
Q. Did you have half of the business done by the firm of J. H. Hunt & Company?
A. I had half of the real-estate business.
Q. Or did you have half of the sales that you made?
A. I had one-half of the commissions on sales of real estate.
Q. Made by Hunt & Company or made by yourself?
A. Made by Hunt & Company.
Q. What was your financial condition in May and June, 1886—how much were you worth?
A. Well, I could hardly say.
Q. Well, about how much?
A. I could hardly say if it is not necessary.
Q. Were you worth one thousand dollars?

Objected to as incompetent, irrelevant, and immaterial.

A. Yes; I presume I was.
Q. Were you worth two thousand dollars over and clear of any debts or incumbrances and liabilities?
A. At what date do you want it?
Q. June, 1886.
A. No; I don't think I was.
Q. Then you were not able to buy this property yourself?
A. No, sir.
421 Q. You had not the money to pay for it when this conversation occurred between you and Mr. Kellam?
A. No, sir; most assuredly not.
Q. Were you not working more on a commission with Hunt & Company, rather than a partnership?
A. No, sir; our business was a commission business.
Q. Did Hunt himself sell any land or pay any attention to the real-estate business?
A. Very little.
Q. You paid attention to the real-estate business entirely—exclusively?
A. Yes, sir.
Q. And Mr. Hunt paid attention to the loan business?
A. Yes, sir.
Q. And you got half of the commission from the sale of real estate?
A. Yes, sir.
Q. And had no interest in the loan business?
A. No, sir; no interest in the loan business.
Q. You were simply virtually an employé of Hunt & Company, were you not?

A. No, sir.

Q. Well, you were not responsible for the contracts made by Hunt & Company yourself, were you?

A. That thing never was tested.

Q. You did not so consider yourself, did you?

A. Yes, sir.

Q. As a matter of fact, were you not working for Hunt & Company simply on a commission—that you should have half of the commissions made out of the real-estate business done by Hunt & Company?

A. I had one-half of the business and one-half of the commissions.

422 Q. You were really, were you not, the gentleman who showed property to parties for Hunt & Company?

A. I did the selling.

Q. And for doing the selling you got half the commissions?

A. Well, the seller always paid the commissions, certainly.

Q. I say for doing the selling you got half of the commission, did you not?

A. Well, of course I got one-half of the commissions; yes, sir; that was our business.

Q. How did you happen to go to Mr. Kellam first?

A. Because I thought it was a very fine tract of land, and a gentleman here in town had requested me to get prices on it.

Q. Who was the gentleman?

A. It was Mr. Williams, of Williams & Updegraff.

Q. Did he direct you to go to Mr. Kellam?

A. He came to the office and wanted me to find a tract of land of forty to 80 acres as close to the city as possible.

Q. What I want to know is, how you happened to go to Mr. Kellam.

A. I went into the court-house to find out who was paying the taxes on the land, and I do not remember whether I looked at the books or not, but some one in the court-house told me that Mr. Kellam paid the taxes on that land.

Q. That was the reason that you went to Mr. Kellam?

A. Yes, sir.

Q. What did you first state to Mr. Kellam? Give the exact conversation as near as you can.

A. As near as I can remember, I went to his office, and——

Q. Just give the date when you went there.

A. It was some time in June.

Q. 1886?

A. Yes, sir.

423 Q. The fore part or the last part of June?

A. I think it was about the middle of June.

Q. Was it not after the taxes have been paid for the June half?

A. After the 20th of June; I don't remember.

Q. Did you not examine the tax-roll to ascertain?

A. No, sir; I do not think that I looked at the books. I went in for the purpose of finding who was paying the taxes, and some

one in the office informed me that Mr. Kellam was the agent, or at least he had attended to paying the taxes.

Q. Did you go immediately up to his office then?

A. I think I went right from the court-house to his office.

Q. What did you say to him?

A. I asked him if it was his uncle that owned a certain tract of land close to the city on the northwest. He said it was. I then asked him if he was the agent for it, and he hesitated a moment—he is not a very fast speaker—and said, "Well, yes," and I think he also stated to me that he paid the taxes.

Q. Did he not state to you that he was the agent to pay the taxes?

A. I don't know as he stated it in those words.

Q. Was not that the idea that you got from the conversation?

A. That was the idea that I got—yes, sir—that he was the agent so far as paying taxes or doing any work about the land.

Q. Now you can go on and state what further took place between you.

A. I then asked him if the land was for sale. He said that he did not know whether it was or not. Shall I give it in as near words as I can—our conversation in full?

Q. Yes.

A. He said he did not know whether it was or not.

424 Q. Why did you just ask Mr. Quinton, turning to him, how you should testify in this case?

A. He is the attorney.

Q. Why did you ask Mr. Quinton if you should give the full conversation when I just asked you in a previous question to go on and give the full conversation?

A. Simply because he is the attorney for this side.

Q. Do you think it is your duty to testify on that side principally?

A. No, sir.

Q. Do you look to that side for instructions as to how you shall testify?

A. No, sir.

Q. Why did you appeal to Mr. Quinton how you should testify?

A. I simply wanted to know if I should give the conversation in full. I might have asked you the same question.

Q. Go on and state now the rest of the conversation.

A. I asked him if the land was for sale, and he said he did not know whether it was or not. I then, before going away, asked him if he would write to his uncle and learn if the land was for sale and also to get a price on it. He asked me what I thought the land was worth, and I told him it was a very valuable piece of land. I did not propose to tell him what I thought it was worth. He rather insisted on my saying what I thought it was worth, and I told him that a piece of land located as that was was very valuable, and that it was difficult for me or any other person to set a price on the land—that is, its actual value—and I also stated to him that if it was 80 acres of land or 160 acres of land two, four, or six miles from town I could very quickly tell him the value of the land, or if it was a

lot inside —, such as we had been used to buying or selling; but a piece of land located the way that was was very valuable,
425 and I did not care to say what I thought it was worth.

Q. You did not know the market value of that property at that time, did you?

A. Yes, sir; I thought I knew about what it was worth.

Q. You knew what you considered it worth for speculation, did you not?

A. Yes, sir.

Q. What did he say in response to your request for him to write and ascertain from his uncle whether the property would be for sale or not?

A. He said he would do it in a week or ten days, and I went and saw him again.

Q. How did you happen to call—by a request from him?

A. No, sir; I made it my business to call on him.

Q. What did you say to him then?

A. I asked if he had heard from his uncle. I don't recollect whether he said he had heard from him or not. If I recollect rightly, he told me his uncle was in Chicago and would be here in a short time.

Q. Who did you refer to as his uncle?

A. Mr. Keith.

Q. Do you know whether Mr. Keith, as a matter of fact, is Mr. Kellam's uncle or not?

A. No, sir; I do not.

Q. Don't you know that he is not?

A. No, sir; I do not.

Q. What else did you say when he told you his uncle was in Chicago?

A. He then asked me what I would give for the land. I told him I was not buying the land. I told him that I thought the land was worth eighty thousand dollars, or asked him if eighty thousand dollars would buy it.

426 Q. Did you make an offer of eighty thousand dollars for the land?

A. No, sir.

Q. You simply gave that as your opinion, as to what the land was worth, did you?

A. I asked him if eighty thousand dollars would buy it, and he said, "No; you know it is worth more money."

Q. When was this conversation?

A. It must have been the first week of July.

Q. Was it at your second interview with Mr. Kellam?

A. I do not remember whether it was the second or third. I saw him frequently.

Q. Was it at the interview in which he told you his uncle was in Chicago?

A. I don't recollect that, either. I saw him several times.

Q. When did you see him again after he told you his uncle was in Chicago and would be here in a few days?

A. I don't remember how many days it was; it might have been a week or it might have been two or three days.

Q. Up to this time had Mr. Kellam told you he was authorized to sell the land?

A. He never told me he was authorized to sell it.

Q. You went to him, then, next time to find out whether or not his uncle had arrived?

A. No; I never went to see him to find out if his uncle had got here or not.

Q. What did you go to see him for, then?

A. I called on him several times to try and learn what his uncle's price was—his uncle's price on the land.

Q. What did he tell you?

A. He never told me; when I would ask him if eighty thousand dollars would buy it he simply said, "No; you know it is worth more money."

427 Q. Why did you waste your time in seeking information from Mr. Kellam when you could have written to Mr. Keith yourself?

A. I did not know his address. I made a great many inquiries to learn his address, but was not able to get it.

Q. Did you inquire of his address of Mr. Kellam?

A. No, sir.

Q. Why didn't you?

A. Simply because men who are acting as agent for a piece of land like that are never disposed to tell the owner's name or address.

Q. Mr. Kellam was not acting as the agent for a piece of land like this; why did you not ask him plainly what his uncle's address was?

A. I considered that he was.

Q. From what?

A. From his conversations with me I considered that he was acting as the owner's agent.

Q. Had he not told you that he was simply the agent to pay the owner's taxes?

A. No, sir.

Q. Did you not say so in the fore part of your testimony?

A. No, sir.

Q. Then you never asked of Mr. Kellam the address of Mr. Keith?

A. No, sir.

Q. How many times did you have an interview with Mr. Kellam altogether?

A. I would not be able to say; six or eight or ten times.

Q. When was the last interview?

A. The last time that we had any conversation in regard to the land—you ask me the last time that we spoke about purchasing it; it was about the 22nd of August.

428 Q. Then during July and August you had eight or ten interviews with him, did you?

A. I saw him several times. I would not be able to say how many times it may have been. Six, eight, or ten times, more or less.

Q. During any of these times did you offer him a certain price for the land?

A. Yes, sir.

Q. When?

A. It must have been about the 20th of August—two or three days before I had the last conversation with him.

Q. Did you go to see him?

A. No, sir; I met him on the street.

Q. What did you say to him?

A. He stopped me and told me that he could give me a price on the land in a few days, and before parting with him I offered him eighty-six thousand dollars. The first time that I had a conversation with him I supposed that there were only eighty acres in the tract, but during this conversation I am speaking about now we talked of eighty-six acres. In the meantime I had learned that there was eighty-six acres, and I offered him one thousand dollars an acre, making eighty-six thousand dollars.

Q. That is, you had not increased the price any time during your interviews with him?

A. Yes; from eighty to eighty-six thousand dollars.

Q. That increase was simply on account of the increase in acreage?

A. The number of acres; yes, sir.

Q. There was no increase in the price, then?

A. No, sir—that is, per acre.

Q. Did you offer him eighty-six thousand dollars cash?

A. No, sir.

429 Q. What was the offer?

A. In our previous conversation he had told me that he thought a payment of twenty thousand to thirty thousand dollars cash would get the land, the rest on deferred payments.

Q. Had you eighty-six thousand dollars cash to pay for the land?

A. No, sir.

Q. Had you twenty thousand dollars?

A. You mean of my own?

Q. To pay for the land.

A. No, sir.

Q. Had anybody authorized you to offer eighty-six thousand dollars for the land?

A. Not directly.

Q. Had you come to any agreement with any purchaser?

A. No, sir.

Q. Had you come to any agreement with any purchaser that you should purchase this land for eighty-six thousand dollars?

A. No, sir; I intended to put in what I could.

Q. Then your offer was simply an offer by you, taking the chances to sell the land for eighty-six thousand dollars?

A. I intended to put in what I had myself.

Q. How much had you yourself?

A. I don't remember the amount at that time.

Q. Had you a thousand dollars?

A. No, sir; but I could have got it.

Q. Then you were not authorized by any person to offer eighty-six thousand dollars for this land?

A. No; Mr. Williams and Mr. Hunt and myself and other of my friends had made up our minds that if we could get it at that price we could raise the twenty thousand dollars to make the first payment.

430 Q. That purchase was to be made for speculation purposes entirely, was it not?

A. Yes, sir.

Q. For the purpose of subdividing and selling it?

A. Well, we had not come to any conclusions as to that.

Q. Well, when you made this offer of eighty-six thousand dollars what did Mr. Kellam say?

A. He said—well, he intimated to me that that price would not get the land.

Q. State what he said and not what he intimated.

A. Well, I think he said, "You know it is worth more money," and he also said to me, "You know that land is worth one hundred thousand dollars."

Q. This was on the 23rd of August, 1886, wasn't it?

A. No; it was on the 20th.

Q. What did you say to him?

A. I said it might be and might not.

Q. What else was said at that conversation—at that interview?

A. I do not remember of much more being said at that time. It was about the same thing over and over—each conversation.

Q. Did you ask him to submit this offer to Mr. Keith?

A. No, sir; he told me he would give me a price in a short time.

Q. Did he do so?

A. Yes, sir.

Q. When?

A. I think it was about the 22nd or 23rd of August. He came into the office to collect a gas bill. We paid him, and he then turned to me and said, "I can now make you a price on the land." I asked him what it was, and he took out his le-d pencil and wrote on a piece of paper, "One hundred and twenty thousand dol-

431 lars; will give you two thousand dollars to sell it." I said no; we did not want it, and after talking a minute or two—I don't think he was in the office but a minute or two—he turned and left.

Q. Did he tell you at that time who he was acting for?

A. No, sir.

Q. Did you know who was the owner of the property at that time?

A. I did not, only from conversations I had heard on the street that morning.

Q. Did you know that Mr. Keith was not the owner of the property at that time?

A. No, sir; I did not.

Q. Did Mr. Kellam at any of those interviews tell you that he was authorized by Mr. Keith to offer this property for sale?

A. No, sir.

Q. Do you know anything of Mr. Kellam having it except paying the taxes upon this land?

A. I don't know that he done that. I don't know that he ever done anything towards paying the taxes or acting as agent for the land in any way.

Q. Were the parties for whom you were assuming to act in making this offer—was their attention ever called to this particular piece of land?

A. Yes, sir.

Q. There was no definite proposition made, except that you would give eighty-six thousand dollars for that, as to the terms of the purchase or sale?

A. No; he said he thought twenty thousand to thirty thousand dollars first payment, and he thought the balance could be arranged in deferred payments.

Redirect examination—questions by Mr. QUINTON:

Q. You say you went to see Mr. Kellam some six or eight different times?

432 A. Yes, sir; six or eight times; probably ten times.

Q. I will ask you if at any of these times that you went to see him if he told you he was not authorized to sell this land.

A. No, sir.

Q. You say you made him an offer of eighty-six thousand dollars for this land?

A. Yes, sir.

Q. You may state whether or not you had not some arrangement or agreement with other parties by which if you could have got that land for eighty-six thousand dollars at that time you could have paid it.

A. If he had accepted the proposition we would have taken the land.

Q. State whether you had any arrangements or any agreement with any other parties who were able with you to take the land at that price.

A. Mr. Williams said he would put in some, and Mr. Hunt, and a friend of mine in Kansas City, and a man who lived at Hannibal, Missouri, would put in some cash.

Q. Were you then prepared by these parties and yourself to have taken that land at eighty-six thousand dollars with a cash payment of twenty thousand dollars that he spoke to you about?

A. I would have made a deposit if he had accepted the proposition; I would have made a deposit for the first payment.

Q. When you say you were not a partner in the firm of J. H. Hunt & Company do you mean by that that there was no written agreement between you?

A. We have a written agreement, and I have it at home, but

neither of us had signed it; we kept putting it off from one time to another.

Q. Further than that you were a partner in the firm of J. H. Hunt and Company?

A. Yes, sir; as far as the real-estate business was concerned.

433 Q. Was not the firm of J. H. Hunt & Company in the months of June and July, 1886, worth more than two thousand dollars?

A. Yes, sir.

Q. You may state, if you know, Mr. Ferguson, how much J. H. Hunt, of that firm, was worth at that time.

Objected to as incompetent, irrelevant, and immaterial.

A. I suppose he was worth forty thousand dollars or over.

Recross-examination—questions by Mr. SMITH:

Q. You say, Mr. Ferguson, that you would have made a cash deposit if the proposition had been taken. How much of a deposit would you have made?

A. Well, I don't know; that would have been determined.

Q. How much could you have made personally?

A. Well, I don't know as to that, I am sure; there was nothing said as to how much.

Q. You do not mean that you could — made the whole cash payment?

A. No, sir; I do not mean that; such a thing is not done.

Q. Had you any method of compelling these parties with whom you had had a verbal arrangement to carry out their part of the contract if they had seen fit not to do so?

A. No, sir.

Q. There were no written obligations between you and them whatever?

A. No, sir.

Q. Simply a loose verbal talk, was it?

A. Well, I don't know whether you would call it loose talk or not; it was business, I considered it.

Q. There was no arrangement made as to how much each one should put in, was there?

A. No, sir.

Q. Simply if you got a chance to buy eighty acres of land
434 adjacent to Topeka at a fair price they would go in with you?

A. That was the talk; yes, sir.

Q. And after you had bought it they could have gone in or not, as they pleased?

A. Certainly; there was nothing compulsory.

Q. And you would not have been able to carry out your contract yourself individually?

A. No, sir.

Redirect examination—questions by Mr. QUINTON:

Q. I believe you stated in your cross-examination that you told Kellam you were representing other parties. Did you state to him who they were?

A. No, sir; I was very careful not to.

Q. At what time was it that Mr. Kellam came to you and gave you a price on this property, Mr. Ferguson?

A. It was about the 22nd or 23rd of August.

Recross-examination—questions by Mr. SMITH:

Q. You knew at that time, did you not, that Mr. Kellam and Col. Holliday were the owners of the property?

A. No, sir; I did not.

Q. Had you heard it rumored that they were?

A. Well, when I came to the office in the morning Mr. Hunt asked me if I had heard that Kellam and Holliday had bought the 86 acres of land that I had been trying to buy, and I told him that I had not heard of it.

J. W. FERGUSON.

435 J. W. FERGUSON, a witness for the complainant, being here recalled, testified as follows:

Direct examination—questions by Mr. QUINTON:

Q. Mr. Ferguson, when you went to see Mr. Kellam these times about purchasing this land, did you go up to his office?

A. Yes, sir.

Q. Did you go there every time?

A. I think so, with the exception of once that I met him on the street on the sidewalk.

Q. In your conversation with Mr. Kellam about the purchase of this land, did you ever say anything about writing or making an offer to Mr. Keith to his uncle?

A. Well, I had asked him to write and get him to set a price on the land.

Q. What did he say in answer to that, Mr. Ferguson?

A. He told me that he did not think he could get him to put a price on it, as he was not acquainted with the values of land in Topeka. It had been several years since he had seen this—in fact, had no reason to think that he knew—had any idea of the value of the land, and that to get him to set a price he would like to have me say what we would give, as his uncle would set a price on the land—or not exactly that—that his uncle would rely upon him what price to set upon the land.

Q. Do you remember, Mr. Ferguson, at any of these times you were up there in his office to see Mr. Kellam, whether Mr. Holliday was in the office or not?

A. Well, I think he was there, but never had anything to say. I do not know that he heard the conversations between Mr. Kellam and myself.

Q. Could he have heard it?

Objected to as incompetent, irrelevant, and immaterial.

A. I do not know.

436 Q. Was he in the same room in which you and Mr. Kellam were in?

A. I think he was there on one occasion.

Cross-examination—questions by Mr. SMITH:

Q. You are the same Mr. Ferguson that was on the stand the fore part of the afternoon, are you not?

A. Yes, sir.

Q. Why didn't you detail this conversation that you have now testified to in response to the questions that I asked you, wherein I asked you to detail all the conversation that occurred between you and Mr. Kellam at these interviews?

A. Simply because it was meeting him on several times, and we had a good many conversations.

Q. How has your mind been refreshed since you first left the witness stand?

A. I told Mr. Quinton Mr. Kellam had told me his uncle would depend upon him to say what the land was worth.

Q. When did you tell Mr. Quinton this?

A. Just a few moments ago.

Q. Did you go to him and tell him this voluntarily?

A. Yes, sir.

Q. Why did you do that?

A. Because I thought it would help his case.

Q. Were you extremely anxious to help his case?

A. No; not extremely anxious; only I like to see what is right done to the men who did own the land.

Q. Are you interested, directly or indirectly, in any respect in the result of this controversy?

A. Not a cent. Mr. Quinton is a friend of mine and I would like to see him win the suit.

Q. Have you been offered any chance to sell this land in case the title is finally vested in some person different than the present owners?

437 A. No, sir; not a word of the kind has ever passed between Mr. Quinton and myself.

Q. Have you been offered by anybody else any inducements, directly or indirectly, that makes you take such an extraordinary interest in this case?

A. No, sir.

Q. When was your mind first refreshed as to your conversation with Mr. Kellam after you left the witness stand, and what caused it to be refreshed?

A. I asked Mr. Quinton if I would be allowed to testify to that, and he said certainly. He also asked me why I didn't say it when I was there.

Q. Is that the reason that you happened to recollect this conversa-

tion between yourself and Mr. Kellam—that you asked Mr. Quinton if you could testify again?

A. No, sir; I did not ask him if I could testify again.

Q. What did you ask him, then?

A. I did not ask him anything; I simply told him.

Q. What did you tell him?

A. I told him that I would have stated that Mr. Kellam had stated to me that his uncle would rely upon him to set a price upon the land.

Q. Why didn't you state that at the time I asked you to state the full conversation between you and Mr. Kellam?

A. At that time I supposed I would not be allowed to state anything that Mr. Kellam had said.

Q. Had you not prior to that time stated many things that Mr. Kellam had said without objection?

A. I didn't suppose I would be allowed to say that Mr. Kellam said his uncle would rely on him.

Q. Why didn't you suppose you would be allowed to say that?

A. I don't know as I could give you any reasons.

Q. What are the reasons?

438 A. I tell you that I didn't think that I would be allowed to state that. I would have stated that at that time, only I supposed you would make an objection.

Q. Why did you go to Mr. Quinton, then, and tell him of this subsequent recollection that you had about the conversation between you and Mr. Kellam?

A. Mr. Quinton came out there and I stated to him that if I had been allowed to state this, or I wished I could have stated that. He said, "Why didn't you?" I told him I didn't think they would allow me.

Q. Is there anything else now that you do not think we would allow you to state that has occurred between you and Mr. Kellam?

A. I can't think of it now; no, sir.

Q. Now, state what did occur between you and Mr. Kellam.

A. When do you mean? What conversation?

A. The last conversation you have referred to.

A. In trying to get him to set a price upon the land he stated to me positively two or three times like this: "Mr. Keith (or my uncle, I don't remember which) is not acquainted with the land in this vicinity and he won't set a price on the land, because he relies on me. He would rely on me to state a price for him to ask." He told me positively that his uncle did not know the value of land here. He would write and recommend a price.

Q. What did you say to that?

A. I did not say anything. I requested him to write.

Q. Do you know whether he did or not?

A. No, sir; I don't know whether he did or not.

Q. When was this conversation?

A. This was—it was either the first, second, or third conversation.

Q. Which?

439 A. I think it was the second conversation.
Q. What time?
A. About the last of June.
Q. Where did it occur?
A. In his office.
Q. Whereabouts?
A. In his office.
Q. Where was his office?
A. His office at that time was over the First National bank.
Q. Who was present?
A. I don't remember whether there was anybody else present. I think that Mr. Clark was there pursuing his work.
Q. How long were you in there?
A. Ten, fifteen, or twenty minutes.
Q. What else occurred; anything?
A. There was nothing that occurred between Mr. Kellam and I, only our conversation about the land.
Q. Have you not testified prior to this that at that time Mr. Kellam told you he had nothing to do with the sale of the land?
A. No, sir; I don't think I testified that.
Q. What did he tell you, then?
A. He did not tell me whether he was authorized to sell it or not.
Q. Didn't he tell you that he did not have authority to sell it?
A. No, sir; I don't think he ever did.
Q. Why, knowing all these circumstances, then, did you not write to Mr. Keith yourself?
A. I stated here before that I did not know his address.
Q. You could have found out his address without any trouble, couldn't you?
A. I made a good many inquiries, but I could not get it.
440 Q. Who did you inquire of?
A. I inquired of Dr. Huntoon, I think.
Q. Which Dr. Huntoon?
A. At that time county treasurer.
Q. Who else?
A. Several other parties; I do not know just who.
Q. Are you certain you inquired of Dr. Huntoon?
A. Yes, sir.
Q. What did he tell you?
A. I think he stated that Mr. Kellam was the agent and to see him.
Q. You did not go to Dr. Huntoon to find out who the agent was, did you?
A. I did not say I did.
Q. What did he tell you when you asked him what Mr. Keith's address was?
A. He didn't tell me what it was. He told me to go and see Kellam.
Q. Who else did you inquire his address from?

A. I don't remember; I think I inquired of a man by the name of Horton.

Q. What Horton?

A. I think his name is M. Horton. He owns a lot just north of the Throop hotel.

Q. Is he an old citizen here?

A. Yes, sir.

Q. Who else did you inquire of?

A. I don't recollect now.

Q. Did you make an offer for this property at the time you stated that Mr. Kellam said that his uncle would be governed entirely by his views as to the value?

A. I don't think I did.

441 Q. Had you made an offer up to that time?

A. No, sir.

Q. What were you there for?

A. I was there to try and learn the price; the owner's price on the land.

Q. You were not there to purchase, then?

A. Well, you may call it that if you wish.

Q. I do not wish anything; I am asking you the question.

A. I was there with a view to purchasing it; yes, sir.

Redirect examination—questions by Mr. QUINTON:

Q. In some of your answers in your first examination here, when you were proceeding to make a statement, didn't Mr. Smith stop you and say that he did not ask for that?

Objected to as incompetent, irrelevant, and immaterial and not proper redirect examination.

A. I believe he did object to some.

Q. And when you were proceeding with your statement did not Mr. Smith at other times interrupt by new questions before you had finished your statement?

Same objection.

A. I think he did.

Q. Since your first examination here had I said anything to you about your testimony or in any manner spoken to you before you came to me and made the statement that you have made here in this examination?

A. Not a word.

Recross-examination—questions by Mr. SMITH:

Q. Do you pretend to say that Mr. Quinton has never talked to you prior to your being placed upon the stand, as to what you would testify to here?

A. No, sir; I don't think that he ever did; he simply asked me one day what I knew about it.

Recross-examination—questions by Mr. SMITH:

442 Q. Have you taken a sufficient interest in this case to canvass for witnesses on behalf of the complainant?
A. No, sir; I never have.
Q. Nothing more than to voluntarily appear and testify?
A. If you wish me to tell why I offered myself as a witness I will tell you.
Mr. SMITH: I do not. That is all.

Redirect examination—questions by Mr. QUINTON:

Q. Mr. Ferguson, were you brought here on a subpœna?
A. My wife told me that a constable was down there this forenoon with one, but I was away from home.
Q. With a subpœna?
A. She said so, but I did not look it up.

Recross-examination—questions by Mr. SMITH:

Q. You were not resubpœnaed after you left the witness stand in the first place, were you?
A. No, sir.

J. W. FERGUSON.

443 JAMES GILLETTE, a witness on behalf of the complainant, being by me first carefully examined, cautioned, and solemnly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

Direct examination—questions by Mr. QUINTON:

Q. What is your business, Mr. Gillette?
A. Real estate and loans.
Q. Where do you reside?
A. Topeka.
Q. Shawnee county, Kansas?
A. Yes, sir.
Q. How long have you been in the real-estate business in the city of Topeka?
A. Seven or eight years.
Q. How long have you lived in Topeka?
A. Sixteen years.
Q. I will ask you, Mr. Gillette, if you are acquainted with and know of a tract of land commonly called the Keith tract, being described as the east half of the southeast quarter of section 25, in township 11 south, of range 15 east, of the 6th P. M., and also the 6 and one-half acres lying immediately north of it, being a part of the east half of the northeast quarter of the same section.
A. I do.
Q. I will ask you if you were acquainted with and knew this piece of land in the months of June and July, 1886.
A. I did.

Q. Were you acquainted with the market value of property in Topeka in the year 1886?

A. I think so.

Q. What was the value, Mr. Gillette, the market value, of this piece of land, 86 and ½ acres, in the months of June and July, 1886?

444 A. In the months of June and July?

Q. Yes, sir.

A. I thought it was worth one hundred thousand dollars in the month of August.

Q. What did you think it was worth in the month of July?

A. Well, it was not worth—it could not be sold for quite so much as it could in August.

Q. What do you think it was worth in the month of July, if you know?

A. I think it was worth ninety thousand dollars.

Q. I will ask you, Mr. Gillette, if you ever attempted or tried to purchase that piece of land.

A. I told Mr. Kellam that I could get him one hundred thousand dollars for that land.

Q. At what time did you tell him that?

A. That was the 6th day of August.

Q. Please relate, Mr. Gillette, the circumstances and the conversation that took place—the whole of it—at this time when you made him that proposition.

A. We were on the land at the time.

Q. Who were with you?

A. Mr. Archer and Mr. McGraw.

Q. Was Mr. Kellam there?

A. Yes, sir.

Q. You four?

A. Yes, sir.

Q. Were on the land?

A. Yes, sir.

Q. Now, proceed and tell us what the conversation was.

A. I was talking with him about the land, and he wanted to know what I thought it was worth, and I told him that I had some parties that would give him one hundred thousand dollars for that land. He said, "I won't recommend one hundred thousand, but I will recommend one hundred and twenty-five thousand dollars

445 for that land." That was the conversation. I also said that I could get him two thousand dollars an acre for a piece on the south end down to Third street. We called it about twenty acres. I don't know how much it was.

Q. The south twenty acres?

A. It would be a diagonal piece running down to 3rd street, and we thought it would be about twenty acres, and I told him I could get him two thousand dollars an acre for that, and he said he would not recommend two thousand dollars, but that he would recommend twenty-five hundred dollars.

Q. Did he say anything about selling a fraction of it or selling the whole of it?

A. He didn't say he would sell any of it.

Q. Did you ask him at that time or anything about who had the control or sale of that property?

A. No, sir. I had always understood by his actions that he was the agent of the land for a good many years—in fact, I bought some timber of him and split some posts for him on that land and bought the tops and took them up to my house, and I supposed he was the agent.

So much of the witness's answer as states his understanding is objected to as incompetent, irrelevant, and immaterial.

Q. Did he say anything about being the agent for it that day?

A. No, sir.

Q. Was that all the conversation, Mr. Gillette, that you had at that time?

A. That was the main portion. Of course we drove across the land from this end clear through, and of course we talked more or less all the way through, but that was the main conversation, as to the purchase of the land.

Q. He said that he would not recommend one hundred thousand dollars, but if you would make the offer one hundred and
446 twenty-five thousand he would recommend it?

A. Yes, sir.

Q. Did he commence this conversation by asking you what you thought it was worth?

A. I don't think he did; I can't just remember how it did commence. We commenced to talk about the land, and I do not remember just who brought up the conversation.

Cross-examination—questions by Mr. SMITH.

Q. What date was this, Mr. Gillette?

A. That was the 6th day of August.

Q. You told him at this time that you could get him one hundred thousand dollars for the land, did you?

A. Yes, sir.

Q. That was a mere opinion of yours, was it not?

A. No, sir.

Q. Had anybody authorized you to buy this particular piece of land for one hundred thousand dollars?

A. They had.

Q. Who were they?

A. Some parties here in town.

Q. Who were they?

A. I can tell you one of them—Mr. Marburg, of Kitchell & Marburg.

Q. Did he tell you that he would give one hundred thousand dollars for the property?

A. He told me to tell Kellam that he would give one hundred thousand dollars for the land; if he could get it for one hundred

thousand dollars that he would go in with some others of us and pay one hundred thousand dollars for that land.

Q. Who were the others?

A. There were several of them.

Q. When did they tell you this?

A. Oh, we had several conversations. We went in and
447 bought some other property.

Q. Did you know who the owner of the land was?

A. I did.

Q. Did you know where he lived?

A. I did.

Q. Mr. Kellam never told you that he had the land for sale, did he?

A. No, sir.

Q. All the connection that he had with the land, as far as you know, was his paying the taxes and allowing other people to pasture their cows on there?

A. Yes, sir; and selling timber off of it, and such things; that is all I know about it.

Q. That is all you know about it?

A. Yes, sir; about his agency.

Q. You do not know whether or not he had any authority to sell that land or to receive any bids for it?

A. No, sir.

Q. Why did you not send this offer to Mr. Keith?

A. I supposed that Mr. Kellam had the full control of the land at the time and always had for years. I have known this land for fifteen years.

Q. Still you never heard him say that he had any control of it?

A. No, sir; I never heard him say; I was just simply led to believe that because he had control of it; he had control of it always, to my knowledge.

Q. Was that the only time that you ever had an interview with Mr. Kellam about the purchase of this land—the time you said you could get one hundred thousand dollars for it?

A. I think it was.

Q. All the offer made to you was to tell him that you could get one hundred thousand dollars for the land?

448 A. Yes, sir. I did not make him any offer. I told him that I could get him one hundred thousand dollars——

Mr. SMITH: You have answered.

WITNESS: He said, "I would not recommend one hundred thousand dollars."

Mr. SMITH: I insist that any further answer made by the witness shall be treated as the testimony for the complainant.

Redirect examination—questions by Mr. QUINTON:

Q. You say you told him you could get him one hundred thousand dollars for this land?

A. Yes, sir.

Q. What reply did he make to that?

A. He said he would not recommend one hundred thousand dollars, but that he would recommend one hundred and twenty-five thousand dollars.

JAMES GILLETT.

449 THOMAS ARCHER, a witness on behalf of the complainant, being by me first carefully examined, cautioned, and solemnly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

Direct examination—questions by Mr. QUINTON:

Q. State your name.

A. Thomas Archer.

Q. Where do you reside?

A. In the city of Topeka.

Q. Shawnee county, Kansas?

A. Yes, sir.

Q. What is your business?

A. Law business and real estate.

Q. I will ask you, Mr. Archer, if you are acquainted with the defendant Edward P. Kellam.

A. Yes, sir.

Q. Are you acquainted and know of a tract of land commonly called the Keith tract, being the east half of the southeast quarter of section 25, township 11 south, of range 15 east, of the 6th P. M., and a part of the east half of the northeast quarter of the same section, township, and range, containing 6 and one-half acres, in all 86 and one-half acres, lying northwest of Topeka?

A. I am acquainted with it.

Q. Were you acquainted with that piece of land or knew of it in the year 1886?

A. I was.

Q. You may state, Mr. Archer, whether you were ever upon that piece of land in company with Mr. Kellam, Mr. Gillette, and Mr. McGraw.

A. I was.

Q. I will ask you if you made Mr. Kellam any offer or sought to purchase that piece of land at that time.

A. I did not.

450 Q. Did you hear any offer made by any one else for the purchase of the land at that time?

A. I heard Gillette make him an offer.

Q. At what time was this that you were on the place?

A. The 6th of August, 1886.

Q. You may state, Mr. Archer, what conversation you heard at that time relating to the purchase of this piece of land, if any.

A. Mr. Gillette said that he would give him one hundred thousand dollars or get him one hundred thousand dollars; I am not certain which. My understanding was that he would give him one hundred thousand dollars.

Q. What answer did Mr. Kellam make to that, if any?

A. He said he would not entertain a proposition of that kind at all, $100,000 for that piece of land, but that if he would make it $125,000 he would notify Mr. Keith.

Q. Did you hear Mr. Kellam say anything about who had charge or control of the property at that time?

A. Not just at the time we were speaking about that. While we were riding across there I was talking with him about it—about the land. He said that he had charge of that, and had had for years.

Q. Did he say that he was acting as the agent in control?

A. For Mr. Keith?

Q. For that piece of land.

A. For that piece of land—he said he had had charge of it and was acting as the agent for years, he said.

Q. Did you hear any conversation had by Mr. Kellam and any one else at that time about dividing the land up and selling part of it?

A. Yes, sir.

Q. What was that conversation?

A. Mr. Gillette said that he would give him two thou-
451 sand dollars an acre for that land down to a certain street, I think it was; I am not certain whether it was 2nd street or 3rd street; down to a certain street; it would make, he said, about twenty acres; that he would give two thousand dollars an acre for it.

Q. What reply did Mr. Kellam make to that?

A. He said he would not think of that, but that if he would make it $2,500 he would consider it, maybe.

Q. Where were you at this time, you say?

A. Right on this piece of land there.

Q. On this piece of land?

A. Yes, sir.

Q. At what time was that?

A. That was on the 6th day of August, 1886.

Cross-examination—questions by Mr. SMITH:

Q. You were not out there for the purpose of looking at this land, were you?

A. No, sir.

Q. Did you open the conversation with Mr. Kellam about the land?

A. I don't recollect whether I opened it in regard to the land about this matter that him and me were talking about or not.

Q. Were you and he together alone?

A. No, sir; we were riding in the carriage two and two.

Q. What kind of a carriage?

A. A two-seated carriage—two on one seat and two on the other.

Q. You and Mr. Kellam sat together?

A. I don't recollect whether I and Kellam sat together or not, or I and Mr. Gillette; I don't recollect.

Q. What did Mr. Kellam say about the land? Did he simply point out that there was some land there that he had charge of?

A. We were all talking about that piece of land; we were riding both ways; we went down through it and came back through it.

452 Q. What did he say about his having charge of it?

A. He was speaking about, I think—speaking about the persons having pasture in there, their cattle, and about the ball ground in there, and of the rent they paid for the ball ground; and during that conversation, when speaking of that, then he mentioned that he had had charge of it for several years.

Q. That is all he said, was it not?

A. He said he had had charge of it and had been the agent for Mr. Keith.

Q. Are you certain that he used the word agent?

A. That is my recollection of it, that he used the word agent.

Q. Or did he simply say that he had charge of it?

A. I think he said agent. He was speaking about the renting of it to the ball club.

THOMAS ARCHER.

453 JOSEPH C. WILSON, a witness on behalf of the complainant, being by me first carefully examined, cautioned, and solemnly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

Direct examination—questions by Mr. QUINTON:

Q. Where do you reside, Mr. Wilson?

A. Topeka, Kansas.

Q. Shawnee county, State of Kansas?

A. Yes, sir.

Q. How long have you resided in Topeka?

A. About 13 or 14 years.

Q. What is your business?

A. Clerk of the United States district court.

Q. I will ask you, Mr. Wilson, if you are acquainted with an- know what is commonly called the Keith tract of land, described as the east half of the southeast quarter of section 25, township 11 south, of range 15 east, of the 6th P. M., and a part of the east half of the northeast quarter of the same section, township, and range, containing six and one-half acres, lying immediately north of it, in all eighty-six and one-half acres.

A. I don't know it by the legal description at all; I know what is commonly known as the Keith tract of land.

Q. Have you known that piece of land as long as you have been in Topeka?

A. Yes, sir; I have known there was such a tract of land.

Q. Were you acquainted with the market value of property in Topeka in the year 1886?

A. Why, to some extent.

Q. Were you in the month- of June and July, 1886?

A. Yes, sir; I presume so; I had my own ideas of the value of

property in those months; that is about all; I did not have any extensive dealings.

Q. What was the market value of this tract of land, Mr.
454 Wilson, in the months of June and July, 1886?

A. A year ago last June and July?

Q. Yes, sir.

A. I should say it was worth from $1,200 to $1,500 an acre, that tract of land there; that would be my best judgment about it.

Cross-examination—questions by Mr. SMITH:

Q. Do you mean that was worth that now or in July?

A. I should think at that time, in 1886, it would be worth that.

Q. Do you know of any property situated somewhat similar to this being sold for any such amount at that time?

A. I knew of some that was farther out from that that sold for about $1,200 an acre at that time.

Q. Any considerable amount?

A. No; a small tract.

Q. Improved?

A. No, sir; near where I live now, at the present time. I do not know that it sold at that time. It was somewhere during the summer.

Q. That would be a speculative value entirely, would it not, that you place upon it?

A. Well, I don't know what you would call speculative value. I presume any value you would set upon suburban property would be speculative.

Q. Would you in June, 1886, without knowing anything about what has subsequently occurred in the rise of property, have paid any such price for that property in June?

A. It is hard to tell what you would have done that long ago. My judgment is now that I would have been willing to have paid $1,200 an acre for that tract; that is my judgment.

Q. Is not that judgment based very largely upon what has
455 subsequently occurred?

A. That is pretty hard to determine.

Q. Would you at that time have taken the uncertainties that existed in the rise of suburban property—have paid $1,200 an acre for the whole tract?

A. I think so.

Q. Do you give that as the market value of this property at that time—what it would have sold for in the market?

A. My judgment is that it would have been worth that in July to have subdivided; yes, sir.

Q. Would it have sold for that in the public market in the mass—one entire amount?

A. I can't tell as to whether it would have sold for that or not, for any one buying suburban property to lay out in additions to the city I should think they would have been willing to have paid that; it looks to me that way.

Q. Was there any market price established for that kind of property here in the month of June and July, 1886?

A. There was some tracts sold along about that time. I don't know of any as large tracts as that.

Q. Were not most of the tracts sold after that time?

A. Yes, sir; most of the tracts were. I think the suburban property was beginning to be in demand at that time, in July.

Q. And had been very inactive and dull prior to that?

A. Yes, sir; there had not been much doing.

Q. Do you know of any considerable amount of suburban property—that is, 20 or 40 or 60 acres or 80 acres in one piece—that was sold prior to June or July, 1886?

A. Well, I don't remember about the exact time. I know some property sold out beyond Topeka, west of Topeka, during the summer of 1886, that year. I could not say exactly whether in was in June, July, or August; it was somewhere about that time,
456 though; I could not tell now; I could not remember the exact date.

Q. What would you have considered the market value of this property in April, 1886?

A. Well, I should think it would not have been worth as much by several hundred dollars an acre; two or three hundred dollars an acre at least.

Q. Did not the rise in suburban property occur in the latter part of July and first of August and September, rather than July, 1886?

A. I should think there was more appreciation in July—that is, the first notable advance, my recollection is, was in July; of course, there was a great advance afterwards.

457 J. S. COLLINS, a witness on behalf of the complainant, being by me first carefully examined, cautioned, and solemnly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

Direct examination—questions by Mr. QUINTON:

Q. State your name.

A. J. S. Collins.

Q. Where do you reside?

A. Topeka, Kansas.

Q. What is your business?

A. Real-estate agent.

Q. Are you connected with anybody in that business?

A. No, sir.

Q. How long have you been engaged in the real-estate business in Topeka?

A. Nine years; I think it will be nine years the 9th of this month, if I remember correctly.

Q. Are you acquainted with what is commonly known as the Keith tract of land, described as the east half of the southeast quarter of section 25, township 11, range 15 east of the 6th P. M.,

and a part of the east half of the northeast quarter of the same section lying immediately north of it, 6 and one-half acres?

A. Yes, sir; I know the land.

Q. Were you acquainted with the value of property in the city of Topeka in the year 1886.

A. Yes, sir; I think so.

Q. I will ask you what the market value of this tract of land was in the month of July, 1886.

A. I should say about one thousand dollars an acre, sir.

Cross-examination—questions by Mr. SMITH:

Q. Do you remember of Mr. Kellam, the defendant in this suit, asking for your opinion as to the value of this land in the month of June, 1886?

458 A. No, sir; I don't recollect any dates. Mr. Kellam and I have talked about the land at different times. He may have done so. I don't know but what he did.

Q. Do you remember what value you placed upon it in June, 1886?

A. No, sir; I do not.

Q. There was a sudden increase in the value of suburban property about this time for speculativ- purposes, was there not?

A. Yes, sir. In July, 1886, I was buying property for the Rock Island railroad. I knew then for a positive certainty that the Rock Island railroad was coming here, and I was purchasing property for them at that time.

Q. Did the public itself know that?

A. I do not know that it was generally known before the latter part of July. I can't say whether it was or was not. I don't know. My impression would be that it was not generally known before the latter part of July.

Q. When it became generally known, in the latter part of July, that the Rock Island road was positively to be built here, what effect did it have upon the values of suburban property?

A. All property increased very rapidly.

Q. Your knowledge that the Rock Island road was certain to be built here, which was not the knowledge of the general public, had necessarily some effect upon your ideas of value at that time, had it not?

A. It would have been, because I could have said to a purchaser with certainty that certain things were going on here.

Q. Then you give your own idea as to the value of this property in 1886?

A. No, sir. I think I could have sold the property in [each*] July, (L. S. W.) [year*] 1886, (changed by L. S. W.) for one thousand dollars. I don't think there is any doubt about that.

459 Q. In the latter part of July?

A. Any time during the month of July.

Q. For the purpose of subdividing?

* Words in brackets erased in copy.

A. Yes, sir.

Q. Did you seek to purchase this property at any time in June or July?

A. No, sir; not myself. I inquired for a price two or three times. I had parties inquiring about the land. I wrote Mr. Keith several letters myself. My last copy-press letter shows the last one written him, I think, the 15th of December, 1885. That letter Mr. Keith did not answer at all. I had written him two, three, or four years previous to that, and Mr. Keith wrote that the land was not for sale.

Q. What did you offer in December, 1885?

A. I did not make him any offer; I simply asked him if his land was for sale; and, if so, at what price.

Q. What was the market value of that property in December, 1885, at the time you wrote the letter to Mr. Keith?

A. I don't know, I am sure; somewhere, I suppose, in the neighborhood of $700 an acre.

Q. That remained about in that condition during the winter, did it not?

A. I think I had a conversation with Mr. Kellam somewhere about that time. I think I wrote that letter upon the strength of a conversation I had with a gentleman from South Bend, Indiana, and he wanted me to get prices on the property. He said he would either purchase the property or would be one of two or three or four to purchase it if it could be had at a fair price.

Q. This $700 per acre was a fair price for the property at that time?

A. I think at that time the property would have brought $700 an acre—at that time.

460 Q. Did not the price of suburban property remain the same during the winter?

A. Well, towards spring there was more, probably, selling than there was during the winter; trading begun from that time.

Q. There was no perceptible increase in the price of suburban property from that time until it was rumored that the Rock Island road was coming in sure?

A. Well, property was stiffening up.

Q. There was no rapid increase?

A. No; no rapid increase. I don't think there was.

Q. There was not much change in the market price, then, of this property until June or July, 1886, was there?

A. Oh, yes; it had been increasing prior to that time; the election was held in the spring; it was known in a general way that the Rock Island road would come in here, and property had been increasing—had been selling rapidly along during the spring and summer.

Q. The great increase was in July and August, was it not?

A. Yes, sir; the largest increase of any month.

Q. What do you think would have been the market price of this property in bulk in June, 1886?

A. I don't know, Mr. Smith, I am sure.

Redirect examination—questions by Mr. QUINTON:

Q. At what time were the bonds voted for the Rock Island railroad?

A. I think they were voted at the regular spring election, some time in April or May.

Q. Was it not the general understanding and expectation that the road was coming?

A. They had stated positively that if the aid was voted it would come, and the papers were agitating it all the time.

Q. And the people generally believed that it would come?

461 A. Yes, sir; it was generally understood that if the aid was voted the road would come.

Q. In response to Mr. Smith's questions, where you stated something about the public or of the public generally not knowing what was being done, you had reference to the fact that you were buying property for the railroad company and meant to say that the people did not know that, as you supposed?

A. I meant that I was purchasing property for the Rock Island road that I did not think the city generally knew of.

Q. You did not mean to say that the people of the city and vicinity did not generally believe that the railroad was coming soon?

A. That I could not say one way or the other. I have no means of knowing what the people of the city might have generally thought or not thought.

Q. Well, the prominent and active business men of the city generally had confidence that after the election that the Rock Island road would be built in here?

A. I believe so. I know I had.

Q. You had such confidence yourself before you became purchasing agent for them, did you not?

A. Yes, sir; I did. I was present at the meetings, where the company made their propositions, and I believed that if the bonds were voted the road would come here.

Q. And upon the election in April and this general confidence there was a very appreciable rise in the value of real estate, was there not?

A. I believe I answered Mr. Smith's questions to that effect; that property continued to increase somewhat in value during the spring and summer, but rose more rapidly after June, about June and July.

Recross-examination—questions by Mr. SMITH:

462 Q. Still there was a degree of uncertainty, was there not, even after the bond election, as to whether the Rock Island road would build into the city or not?

A. I did not so understand it, Mr. Smith. I can't speak for what other people understood.

Q. Was not the reason that you did not so understand it from

the fact of the inside knowledge that you had by virtue of your being their agent for the purchase of property?

A. No, sir; understood their propositions to the city to be plain, fair, square propositions to the city and county, and I had confidence enough in the gentlemen making them to believe that if the bonds were voted they would build the road.

Q. Do you believe the mere fact of the voting of bonds to the Rock Island road caused the rapid increase in the value of property or the fact that it was finally determined by the Rock Island Company purchasing property here in the city that they would come into the city?

A. What time do you refer to?

Q. At the time that they commenced purchasing property.

A. Well, I think the voting of the bonds strengthened the confidence of our real-estate speculators very materially, and I think it was strengthened much more when they began purchasing property; it was then an assured fact that they would come here.

Q. And the latter time was the time that the property increased suddenly in value, did it not?

A. It increased faster than it did any other time; yes, sir.

J. S. COLLINS.

The further taking of testimony was here adjourned until October 6th, 1887, at 10 o'clock a. m., at the same place.

LESTER S. WILSON, *Examiner.*

463 TOPEKA, KANSAS, *October 6th*, 1887—10 o'clock a. m.

Parties met pursuant to adjournment.

Present as before.

And J. N. STRICKLER, a witness on behalf of the complainant, being by me first carefully examined, cautioned, and solemnly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

Direct examination—questions by Mr. QUINTON:

Q. Where do you reside, Mr. Strickler?

A. Topeka, Shawnee county, Kansas.

Q. How long have you resided there?

A. A little over 14 years.

Q. What business are you engaged in now?

A. Real estate and real-estate loans.

Q. How long have you been engaged in the real-estate business in the city of Topeka?

A. Well, I have been regularly engaged in it for about six years; before that only partially.

Q. Engaged in business alone, or did you represent a firm?

A. A firm at present.

Q. What firm is it?

A. The firm of Strickler, Daniels & Pounds.

Q. I will ask you, Mr. Strickler, if you are acquainted with and

know of a tract of land commonly called the Keith tract and being the east half of the southeast quarter of section 25, township 11, range 15 east of the 6th P. M., and also six and one-half acres lying immediately north of it, being a part of the east half of the northeast quarter of the same section, in all 86 acres.

A. I am acquainted with the tract known as the Keith tract.

Q. Are you acquainted with the value of real estate in the city of Topeka?

Objected to as incompetent, irrelevant, and immaterial.

464 A. Yes, sir.

Q. Were you acquainted with the value of real estate in the city of Topeka in the year 1886?

Same objection.

A. Yes, sir.

Q. I will ask you to state, Mr. Strickler, what the market value of this piece of land was that I have described to you here in June or July, 1886.

A. Well, the market value, in my opinion, was about $1,000 an acre. I base that opinion upon the price that parties would have paid for it then who were negotiating or trying to have me negotiate for the tract of land.

Q. I will ask you, Mr. Strickler, if in the year 1886 and prior to July you sought or attempted to purchase that tract of land.

A. Yes, sir.

Q. To whom did you go to make that purchase?

A. I went to see Mr. Kellam.

Q. How did it happen, Mr. Strickler, that you went to see Mr. Kellam?

A. I knew that Mr. Kellam had or it was understood that Mr. Kellam had charge of the land; that Mr. Keith was some relation of Mrs. Kellam, and that he could give me more information than anybody else on the subject.

Q. Did Mr. Kellam ever tell you that he had the charge and control of that piece of land before that time?

A. I do not think he did.

Q. Was it generally understood and considered that he had the control and charge of that land, if you know?

Objected to as incompetent, irrelevant, and immaterial.

A. It was.

Q. Did you go and see Mr. Kellam for the purpose of purchasing that land?

465 A. Yes, sir.

Q. When was that?

A. It was in the spring of 1886; I could not say what time, because I have not kept any memorandum.

Q. About what month was it, if you can tell?

A. It was probably about April; I have not kept any minutes.

Q. Did you go and see him more than once?

A. Yes, sir; I spoke to him several times.

Q. What was the conversation that you had with him on the first occasion you went to see him?

A. As near as I can recollect, Mr. Kellam said that he had no price on the land—that is, that Mr. Keith had no price on the land that he knew of. I did not make Mr. Kellam an offer and he did not give me a price. I asked him whether he could find out and he said yes; that there was no price on it to his knowledge. I tried to get Mr. Kellam to state what Mr. Keith would take for it, but he could not; he said he could not.

Q. Give, as near as you can remember, the exact words of the conversation—what you said to him and what he said to you in that conversation.

A. I could not recollect exactly; I merely told Mr. Kellam that there were some parties that might buy or would buy the Keith tract, provided it could be bought at a reasonable price on reasonable terms; that they were ready to buy it.

Q. Were you prepared at that time to have purchased the land if it could be bought at a reasonable price?

A. Yes, sir.

Q. What did you consider a reasonable price at that time?

A. They considered a reasonable price one thousand dollars an acre.

Q. Go ahead, now, and state, as near as you can, all the conversation that you had with him, and what he said to you and
466 you to him, all these times that you went to see him.

A. I never had any definite conversation to my recollection. It was merely words to that effect, and I think at one time Mr. Kellam told me that he would soon go to Omaha and see Keith, and he could get more definite information as to the price, and so I did not urge anything, waiting to hear something definite as to what could be done. I commenced losing hopes of buying it, because I was informed on the street that one thousand dollars had been refused, and that was about our figure that we thought we could pay; we did not think we could pay beyond that in order to make a good profit out of it.

So much of the foregoing answer as states information in regard to one thousand dollars having been refused is objected to by the complainant as incompetent, irrelevant, and immaterial.

Q. Did Mr. Kellam say anything to you during these conversations about his being the agent of the land?

A. I don't think that he did.

Q. Did you get the impression or did you know from what conversations you had with him or what he did that he was the agent, and for whom?

Objected to as incompetent, irrelevant, and immaterial.

A. I understood that he was the representative of Mr. Keith.

Answer objected to for the same reason.

Q. Did you ever make Mr. Kellam an offer for the land?
A. I did not.
Q. Did he ever set a price to you on the land?
A. He did not.
Q. Did you see him after he said he would go to Omaha and see his uncle; did you see him after that time?
A. I could not now state whether I saw him after that or not, but the reason I dropped the matter it was soon reported sold, and I paid no more attention to the matter.

467 The foregoing answer is objected to as incompetent, irrelevant, and immaterial.

Cross-examination—questions by Mr. SMITH:

Q. At the time you have testified to was there any market for the sale of property of this character in Topeka?
A. Yes, sir.
Q. What time do you fix that the market value of this property was one thousand dollars per acre?
A. It was, I should say, from the first of March to the first of July; during any time my parties would have taken it at a thousand dollars an acre.
Q. Do you know of any tract of land situated similar to the tract in controversy being sold at any such figure during the period from March to July in the vicinity of Topeka?
A. I do not, because there is no other tract situated like that.
Q. Then the only way that you determine the market value is from the knowledge you have of what parties would give for that particular piece at that time?
A. No, sir.
Q. How do you determine it if there was no other piece of land of that character?
A. By comparing it with the prices that were paid for other land.
Q. What other lands were any such prices paid for at this time?
A. The land right west of it; the Potwin place was selling off in acre tracts at a much larger price; that parties were willing to buy this and cut it up and sell it off; that is what makes the market value of the land.
Q. Was there any extraordinary inducements offered by Potwin to purchasers of lots in his subdivision?
468 A. Not more so than were offered in other subdivisions around the city.
Q. I did not ask what were offered in other subdivisions around the city. I asked if there were not extraordinary inducements offered to purchasers in Potwin place in the way of furnishing capital to erect residences at low rates of interest, giving long periods of time in which to pay for the real estate and also improvements.
A. Yes, sir.
Q. Do you know of any other property that was sold for any such price at the periods you have mentioned?
A. Not any such tract as that.

Q. Or any way near as large a tract as that?

A. There were smaller tracts sold at that price and even higher.

Q. What smaller tracts were sold at any such price at this time?

A. We could give you several.

Q. Give me one.

A. There were several tracts of land sold by being cut up; take, for instance, in the southwest part of the city, there was some sold at $1,600 an acre that I came pretty near buying myself; another gentleman just bought it before me.

Q. What tract of land was that?

A. That was out in Throop's, towards Washburne college.

Q. Was that sold in one entire lump?

A. It was a few acres; yes, sir; by the acre.

Q. Was it sold in one entire lump?

A. Yes, sir.

Q. How many acres?

A. In one there was one acre that was sold for $1,600; then there were a couple of acres that lay down under the hill that
469 were sold, I am creditably informed, for $1,100; I do not know that positively; I am only informed that.

Q. Was that this piece you refer to as being sold for this price—his three or four acre tract?

A. The one was an acre tract and the other was several acres.

Q. Do you know of any such tract of land of 70 or 80 acres being purchased at any such price as that?

A. I do not, because the tracts were not here to be purchased.

Q. What other property do you know of being sold at any such figures as the one you have placed upon the Keith property at that time?

A. It would take me a little while to figure back to the exact tracts, because I have not thought of them.

Q. Well, you can take time to figure back to the exact tracts and give me any that you can.

A. I don't know as there were any tracts sold at that exact time when I was having this conversation outside of those that I have mentioned—outside of those in small lots and subdivisions.

Q. It is, then, by a comparison of the sales of these small pieces of property and lots at the figures mentioned that you arrive at your opinion that this Keith property was worth the price that you have stated?

A. Yes, sir; but the price on the Keith property at the wholesale price is much less than what this other property was selling in small tracts.

Q. What did you consider the market value of the south 20 acres of this Keith tract at the time you have testified in regard to?

A. Of the south 20 acres? Well, I would consider that the south 20 acres the market value was $1,500 an acre.

470 Q. What of the south 40 acres?

A. Well, the south 40 would be—I think that the parties would have paid $1,200 an acre for the south 40; probably we would have paid $1,500 for the south 40.

Q. Well, what would you consider the remaining portion of it worth?

A. By itself it would not be worth as much; not over $800 an acre.

Q. Do you pretend to say that the north 40 of this property would have sold at any time you have mentioned or the market value of it was $800 an acre?

A. Yes, sir.

Q. Do you know of a piece of property lying adjacent to this on the north that was owned by Dan. Horne?

A. Yes, sir; I do.

Q. Do you know of its being appraised at this time?

A. I do not. I know it was offered——

Q. Do you know of its being appraised at $150 an acre?

A. I do not. I do know that Horne tried to sell it to us at a good deal more.

Q. I do not ask you what Horne tried to sell it to you for. When was the first time that you approached Mr. Kellam in regard to this property?

A. I could not state the exact time; it was some time in the spring, as I stated; I did not keep any memorandum or any minutes of it.

Q. In May?

A. I think it was earlier, but I could not say as to a definite time. I connected the whole matter as to the spring; I know it was before the summer; I know we commenced to talk of the matter early in the spring.

Q. Was it before or after the Rock Island bond election was
471 carried in the city of Topeka?

A. My recollection is that the first conversation was before.

Q. What did you consider the market value of this property at that time?

A. I considered, as I stated before, the market value of that property at $1,000 an acre.

Q. At that time?

A. Yes, sir; I did not vary it any.

Q. What did you consider the market value of this property on the 1st of January, 1886?

A. Well, it was worth very nearly as much.

Q. I am not asking you what it was worth. I am asking you the market value of it.

A. I considered it worth $1,000 an acre.

Q. In 1886?

A. Yes, sir.

Q. Is not the value that you place upon this property now largely determined by you from the remarkable growth and advance in prices of property in the vicinity of Topeka since the spring and summer of 1886?

A. No, sir; because the market value during this summer is a great deal more than it was then.

Q. Well, does not that fact have a strong influence upon you in

now determining that the market value of this property in the spring and summer of 1886 was the price you have stated?

A. No, sir; it does not.

Q. Would you yourself have been willing to give eighty-six thousand dollars for this tract of property, if you had been fortunate enough to have that money yourself, in January, 1886?

A. Yes, sir. There was a syndicate making up as early as that.

Q. I did not ask you anything about a syndicate making
472 up as early as that. I asked you a simple question. The question was, Would you yourself have been willing to give eighty-six thousand dollars for this tract of property, if you had been fortunate enough to have that money yourself, in January, 1886?

A. Yes, sir.

Q. Is the value that you have placed upon this property the value that it would have sold for in open market or the value that you place upon it for speculation purposes?

A. It is the value that it would have sold for in open market, because there were a number of parties ready to buy it.

Q. When?

A. There were parties talking to me about that as early as 1885, when the Potwin place first commenced to sell, when the houses were commencing to build in Potwin place.

Q. What was the market value of this property early in 1885?

A. Well, the market value early in 1885—in the latter part of 1885 men were ready then—one man was ready then to pay $800 an acre.

Q. For the entire tract?

A. Yes, sir.

Q. Who was this man?

A. Well, I don't know as I care to state that.

Q. Well, I care to have you do it.

Mr. QUINTON: I guess it is not necessary.

WITNESS: Parties that come to us to make offers do not care to *to* have us state what they want to buy or what they want to pay for it.

Q. Do you refuse to answer the question who this man was?

A. Yes, sir.

Mr. SMITH: The examiner is here requested to certify the foregoing question and refusal of the witness to answer the same to the circuit court, for the purpose of having it determined whether the witness shall answer the question or not.

473 Mr. BERGEN: The examiner will note that the plaintiff objects to the question because it is no proper cross-examination; that it does not refer to any time as to which complainant examined witness nor to any matter upon which plaintiff examined the witness, and that it is not material, relevant, or competent.

Q. After the first interview that you had with Mr. Kellam when did you next see him?

A. I could not tell how long afterwards it was.
Q. About how long?
A. Oh, it was probably a couple of weeks.
Q. Did you go to see him?
A. Yes, sir; I think I probably called on him several times in his office and met him once or twice—spoke to him once or twice on the street.
Q. For what purpose?
A. For the purpose of learning whether the tract could be purchased, and at what price.
Q. What did you ascertain from him?
A. Nothing.
Q. Did you call on him again?
A. Well, I called on him several times, but I don't know *when* (whether) "again" is after I called on him.
A. Well, "again" is after the time you called on him—after the second time you called on him.
A. I could not state how many times I called on him.
Q. Then when you say you called on him several times do you mean that you called on him twice?
A. It may have been three times; it might have been. I did not keep any memorandum. It was merely a (in) course of business. I did not get any information, and I saw him again and did not get sufficient information to keep any dates or memoranda.
Q. Well, at the time you called on him first what did you
474 say to him?
A. I asked him whether the Keith tract could be purchased, and at what price.
Q. What did he tell you?
A. He said he did not know whether Keith would sell it or what Keith would take for it.
Q. Did you know who Mr. Keith was?
A. I did not know him personally.
Q. Did you know who Mr. Keith was?
A. I knew he was a gentleman who lived in Nebraska; that was all.
Q. Did you know where he lived?
A. I was told he lived at Omaha.
Q. After you failed to obtain the information that you sought from Mr. Kellam did you write to Mr. Keith?
A. No, sir.
Q. Why didn't you?
A. Because I supposed that Mr. Kellam had full authority to act, and that any matter would be referred to Mr. Kellam.
Q. Did you suppose that after you had ascertained from Mr. Kellam that he had nothing to do about it?
A. Well, Mr. Kellam did not inform me that he had nothing to do about it.
Q. Didn't he inform you that he had no price upon the property?
A. Yes, sir.

Q. That he did not know it was for sale?
A. Yes, sir.
Q. What else were you seeking for?
A. I asked Mr. Kellam to get the price—whether it could be purchased, and at what price.
Q. When did you ask him that?
475 A. The first time I saw him.
Q. What did he say?
A. Well, my recollection is that he gave me to understand that he would see what the price and terms were that it could be purchased for, and so on.
Q. What did he say?
A. I could not give you the exact language, but my recollection is that he said he would learn from Mr. Keith whether it was for sale, and at what price. He also told me at that time, when I called on him, that he would go either to Omaha or Nebraska and he could learn definitely about the matter.
Q. Was it in pursuance of this information that you called on him the second time?
A. Yes, sir.
Q. What did he tell you then?
A. That he had no more information; that he had not learned yet.
Q. Did you ever call on him again?
A. I stopped him on the street, I think, once or twice, and asked him whether he could tell me anything about the Keith tract, and he said, No; nothing definite. He didn't give me any definite information.
Q. So you never did get any information from Mr. Kellam?
A. No, sir.
Q. And never did seek to purchase the property from Mr. Keith?
A. No, sir.
Q. Although you understood that Mr. Keith lived in Omaha?
A. Yes, sir.
Q. Did you cause anybody to correspond with Mr. Keith?
A. I did not. I was waiting for Mr. Kellam.
Q. Did any members of your firm correspond with Mr. Keith?
476 A. No, sir; I did not. I was waiting to get the information from Mr. Kellam, and we did not care to urge it too much. We thought he might be disposed to put the price up too high and were not aware that so many were trying to buy it at the same time.
Q. He had not put up the price at all, had he?
A. No, sir.
Q. And did not offer the property for sale?
A. No, sir.
Q. And said he had nothing to do with the selling of it?
A. He did not say that.
Q. Did you ask him that?
A. I did not. I simply asked him for this information.

Q. And he told you he could not give it?

A. He said he would have to hear from Mr. Keith before he could give the definite information.

Redirect examination—questions by Mr. QUINTON:

Q. I will ask you if there is any other unimproved land adjoining the city of Topeka situated as this land is as valuable as this tract of land.

Objected to as incompetent, irrelevant, and immaterial.

A. No, sir.

Q. I will ask you if it is not a fact that the Potwin place—if Potwin place does not lay the other side of this tract of land as regards the city.

Same objection.

A. Yes, sir.

Q. I will ask you, Mr. Strickler, how *those* Throop's addition compared with this tract of land that you speak of as selling at $1,500 an acre.

Same objection.

A. It compared about equally with it.

Q. Could there not have been or was there not other property that you do not remember of now sold in the city of Topeka
477 at that time?

A. Small tracts—there were.

Q. As regards this Horne tract of land, how does that compare, Mr. Strickler? Is it not a fact that the railroad lies between that and the city?

A. It is all down in the river bottom, and the railroad cuts through it. I know this from personal inspection.

Q. You were interrupted, Mr. Strickler, in your answer to Mr. Smith's question in regard to this Horne tract of land. You may state what you know in finishing that answer.

A. Mr. Horne came to me and wanted to sell the land to us, or rather to the Kansas Lot and Land Company. At the request of Judge Guthrie and some others I went with Horne and walked over the piece of ground; we examined the entire piece of ground. I told Mr. Horne that in my opinion it was not good ground to cut up into lots at all. It was low ground, cut by a creek or ravine and the railroad.

Q. Is that your opinion, Mr. Strickler, as regards the Horne tract—being in the bottom and cut up as you say?

A. It is; I know it is. I examined it and know where it is.

Q. Mr. Smith was asking you if you would have given eighty-six thousand dollars for this piece of ground in January. In your answer you were interrupted again by him. Will you please finish that answer now?

Objected to as incompetent, irrelevant, and immaterial and for the reason that he was not interrupted in his answer.

Q. You went on to state, I believe, Mr. Strickler, that you and some parties were ready to buy it at that time?

A. Yes, sir.

Q. Please finish that answer.

A. There were several parties about that time—I could not state whether it was exactly in January, but it was in the winter—that were ready to buy it, and I have no doubt they could have
478 raised sufficient money. I would have no objections to giving you two of those names who were talking to me at that time.

Q. You may state who they were.

A. One was Mr. Seabrook and one was Mr. Sam. Cross. They were two of the men, and there was a great deal of conversation which is not necessary to tell that took place.

Q. You say, Mr. Strickler, in your cross-examination that you went to see Mr. Kellam to get a price on this land, and that he told you he was going to Omaha and he would try and get a price, or he would see Mr. Keith. You went to see him after that, you have stated. Did you learn from Mr. Kellam at that time whether or not he had been to Omaha or Nebraska?

A. I don't think I asked Mr. Kellam the question; I merely asked him whether he could give me any more information on the Keith tract, and he said he could not give me any definite information.

Q. Did you learn from him at that time whether he had been to Nebraska?

A. I did not.

J. N. STRICKLER.

479 N. F. HANDY, a witness for the complainant, being by me first carefully examined, cautioned, and solemnly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

Direct examination—questions by Mr. QUINTON:

Q. Where do you reside, Mr. Handy?

A. Topeka, Kansas.

Q. How long have you resided here?

A. My residence the last time that I lived here commenced in April, 1886, I think.

Q. Had you resided in Topeka before that time?

A. Yes, sir; I had lived here previously.

Q. How long had you lived here the first time?

A. About seven years, I think.

Q. What is your business?

A. I was practicing law the first time I was here; do you mean now?

Q. What business have you been engaged in since you have been in Topeka this last time?

A. I have been acting as secretary of the Interstate Land Company and doing some business on my own account.

Q. Have you been engaged in buying and handling real estate at all since you have been in Topeka this last time?

A. Yes, sir.

Q. I will ask you if you are acquainted with and know the tract of land commonly called the Keith tract and described as the east half of the southeast quarter of section 25, township 11, range 15 east of the 6th P. M., and also a part of the east half of the northeast quarter of the same section, six and one-half acres, lying immediately north of it, in all eighty-six and one-half acres.

480 A. I know what is known as the Keith tract. I do not know *know* it by that description, the one lying east of the Potwin place.

Q. Were you acquainted with the market value of property in the months of June and July, 1886?

A. Well, I thought I was somewhat acquainted with the value of property.

Q. What was the market value of that tract of land in the months of June and July, 1886, Mr. Handy?

A. Well, it was worth a thousand dollars an acre, at any rate, according to my judgment.

Cross-examination—questions by Mr. SMITH:

Q. Do you think that the rapid increase in values since that time has any influence on your judgment as to the value of property then?

A. Not on my judgment then. Shall I tell you why?

Q. Yes, sir.

A. The company that I represented, which includes some gentlemen here that are pretty well posted in prices upon real estate and upon whose judgment I relied as much as upon my own, agreed that we would make up a company and take it at a thousand dollars an acre in May or the early part of June that year.

Q. For what purpose?

A. For cutting it up and dividing it and putting it upon the market and selling it.

Q. It was for that purpose that you considered the property worth one thousand dollars an acre?

A. Yes, sir; I thought we could make some money by buying it at that.

Q. And selling it out?

A. By selling it out in small parcels—laying out streets and improving it.

481 Q. There was really no market for property of that kind in the lump, was there, at that time?

A. I cannot state whether there was or not. I know that we looked for investments for our company, and also some of us as individuals, and made up our minds that we would be glad to purchase this at a thousand dollars an acre.

Q. For speculative purposes?

A. Yes, sir; for speculative purposes entirely.

Q. That was the value of property at that time for speculative purposes, was it not?

A. If you say only value I say no.

Q. I do not limit my question to only.

A. It would not be worth that for farming, but I thought its proximity to the city warranted our paying that much at that time, and that we had a reasonable prospect of making some money out of it.

Q. Was there a rapid increase in values in suburban property during the months of May and June, 1886?

A. I should say there was a steady increase, as far as my knowledge goes; a pretty rapid increase, I might say.

Q. Was there not a very rapid increase after it had been determined that the Rock Island road was to build in here?

A. There was a very rapid increase in values here, I think, in the spring of 1887—spring and winter of 1887.

Q. Was there not in June and July of 1886?

A. There was an increase, but I would not say that I considered it a very rapid increase during that time, Mr. Smith.

Redirect examination—questions by Mr. QUINTON:

Q. You may state whom you authorized to see any one about the purchase of this property.

Objected to as incompetent, irrelevant, and immaterial and not proper re-examination.

A. I had a conversation with several parties—among the
482 rest, Mr. Stringham that I remember of distinctly, and I asked Mr. Stringham to see Mr. Kellam and see what it could be purchased for, but I never talked to Mr. Kellam myself about it. That was in May or June, 1886.

All that part of the foregoing answer stating what the witness said to Mr. Stringham objected to as incompetent, irrelevant, and immaterial.

N. F. HANDY.

483 T. L. STRINGHAM, a witness on behalf of the complainant, being by me first carefully examined, cautioned, and solemnly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

Direct examination—questions by Mr. QUINTON:

Q. Where do you reside?

A. In Topeka, Kansas.

Q. How long have you lived in the city of Topeka?

A. A little over 20 years.

Q. What business have you been engaged in in the city of Topeka or are you engaged in now?

A. I am engaged in the real-estate and loan business now—the National Loan and Trust Company.

Q. How long have you been engaged in the real-estate business in Topeka?

A. Since 1880.

Q. I will ask you if you are acquainted with the tract of land

commonly known as the Keith tract, in Topeka, Shawnee county, Kansas, and described as the east half of the southeast quarter of section 25, township 11, range 15 east of the 6th P. M., and also a part of the east half of the northeast quarter of the same section, lying immediately north of it, containing six and one-half acres, in all eighty-six and one-half acres.

A. Yes, sir.

Q. I will ask you if you were acquainted with the market values of property in Topeka, around Topeka, in the year 1886.

A. Yes, sir; I was pretty well acquainted with the value of property.

Q. I will ask you, Mr. Stringham, to state what the market value of this tract was in the months of June and July, 1886.

A. Well, my judgment would be that it would be at least one thousand dollars an acre.

484 Q. I will ask you, Mr. Stringham, if you sought to purchase this tract of land during that year; and, if so, at what time?

A. Well, I did not make very much of an effort to purchase it; I think in June—I think probably it was June; it may have been May or it may have been the first of July—I saw Mr. Kellam and had some conversation about the Keith tract and about his tract, but I do not know that even that conversation would lead him to think that I was trying to purchase it or just what I was at. I asked him if it was for sale or if it would be for sale, and he said it might be, or some sort of an evasive answer. He did not give me the impression that it was for sale, but that I could not buy it at that time. He stated there was no price on it at that time.

Q. Were you authorized by any one, Mr. Stringham, to ascertain what that property could be bought for at that time?

Objected to as incompetent, irrelevant, and immaterial.

A. Yes, sir; there was no one that authorized me to buy it at that time, but Mr. Handy and one or two other associates said that they were willing to take an interest in it—be one of eight or ten men—for one thousand dollars an acre.

Q. You may state, Mr. Stringham, as near as you can recollect, the conversation that you had with Mr. Kellam at that time.

A. I guess that would be a pretty difficult task for me.

Q. Well, as near as you can recollect it.

A. My impression is that I first asked him what he would take for [illegible] eighteen acres out southwest of town.

Mr. Bergen: That is incompetent, to say your impression. If it [illegible] recollection of the substance, then you can go on and state

[illegible] did have some conversation in regard to that piece [illegible] that 18 acres out there—and finally I asked him if [illegible] tract was for sale or if there was any price on it at [illegible] he either said that he did not know that it [illegible] for sale; that there was no price on it at that [illegible] there would be, and he thought probably that

there would be some time in the season. I told him that I would like to have a chance at it, and that was about all the conversation I had with him in regard—there was perhaps 10 or 15 minutes' talk about matters, but in regard to that there was very little talk about that. I simply got the impression that I could not buy it through Mr. Kellam, and we talked but very little about it.

Q. You may state what you recollect the conversation to have been about Mr. Kellam's 18 acres that you had at that time.

Objected to as incompetent, irrelevant, and immaterial and having no bearing upon such controversy.

A. I asked him the price of it, and he either said to me that he would take $1,500 an acre or that he might consider an offer of $1,500 an acre, and I could not say much, but that price was named, and I do not think that he stated that he would take any certain amount, but that he would consider an offer of that.

Q. Was this Kellam tract of land at that time improved in any way, Mr. *Kellam*?

Objected to as incompetent, irrelevant, and immaterial.

A. It was only fenced.

Q. How was it situated as to the distance from the central part of the city in regard to the Keith tract of land? Was it as far away or farther from the central part of the city as the Keith tract of land?

Same objection.

A. I guess there is not much difference in the distance.

Q. How were the residences in the immediate neighborhood of it or opposite it in regard to residences around the Keith tract of land—as good?

A. It was a little better around the Keith tract of land at
486 that time.

Q. How was it about there being more or less residences near the Keith tract of land than there was around the Kellam tract?

Same objection.

A. There were more adjacent to the Keith tract.

Cross-examination—questions by Mr. SMITH:

Q. How do you arrive at the market value of property at this time Mr. *Kellam?*

A. Well, sir, I guess it is mostly by comparison—what other sell for.

Q. Were there any other tracts of land similar to t[illegible] city of Topeka sold for one thousand dollars an acre during the [illegible] and July, 1886?

A. I don't remember of any being sold at tha[illegible] business now—the

Q. There was no what would be considered [illegible]e real-estate business of this magnitude here in Topeka at this tim[illegible]

[illegible]ted with the tract of land

A. Yes, sir; there was a market—that is, at that time there was for properties of that magnitude.

Q. For what purpose?

A. Well, for speculation largely, cutting up into town lots.

Q. That is the element that you consider in determining what the market price of this property was at that time, is it not, for speculation and cutting up into town lots?

A. Yes, sir. Of course it was not worth that for a farm.

Q. This has not been cut up into town lots yet, has it, or platted?

A. Not that I know of.

Q. Mr. Kellam never indicated to you in any manner that he had this property for sale, did he?

A. No, sir.

Q. Why did you go to Mr. Kellam to ascertain about this
487 property?

A. Why, Mr. Handy asked me to.

Q. The gentlemen with whom you were associated that were seeking to purchase property in the vicinity of Topeka were purchasing it for the purpose of subdividing and selling lots, were they not?

A. Yes, sir.

Q. Was there not a sudden rise in values in suburban property in the vicinity of Topeka in the months of June and July, 1886?

A. I think not; there was a pretty rapid rise after about the first of September; about the middle of August it probably began to have a material rise, but from that on it was pretty rapid. But why I remember of it being on that date—that is, in August—was that about the first fever of buying property here was after I had bought quite a considerable property here for the Interstate Land Company, which was in August.

Q. The purchase of that property exhilirated prices very much, did it not?

A. Yes, sir.

Q. And prior to that time there had not been any great transfers of suburban property out there?

A. No, sir; it was gradual.

Redirect examination—questions by Mr. QUINTON:

Q. You state, in answer to a question by Mr. Smith, that at the time of June and July there not being property of this description sold, I will ask you if there had been prior to that time.

A. Oh, yes, sir.

Q. I will ask you to state what tracts, if any, you know of being sold prior to that time similar to this.

A. Well, there was a piece out of the Brooks tract, known as the Brooks tract, immediately west of town, bought by what is termed the Boulevard syndicate; I guess 25 acres; over 20 acres, anyway.

488 Q. Do you know at what time that was purchased in 1886?

A. It was not purchased in 1886; it was in 1885, I guess.
Q. About what time?
A. I think in the spring of 1885.
Q. Do you know what that sold for at that time?
A. $1,500 an acre, I think.
Q. Were there any improvements on that tract of land?
A. No; no houses.
Q. I will ask you how that piece of land is situated as regards the central portion of the city compared with the Keith tract—as to distance from the central portion of the city.
A. It is about the same as the nearest part, the best part, of the Keith tract, or perhaps a little nearer. I could not tell without a map. On the first estimate I should say it was about the same as the nearest part of the Keith tract. It would be better than the average of the Keith tract, of course.
Q. In answer to Mr. Smith's question as to what value you put upon this property—I will ask you if this property was not valuable and in demand at the time, June and July, as residence property.
A. Yes, sir; it was in demand. There could have been property sold right along in that tract.
Q. I will ask you again, Mr. Stringham, why was it or how did it come that you went to Mr. Kellam to see about the purchase of this land.
A. I went at the instance of Mr. Handy.
Q. Why did you go to Mr. Kellam?
A. Because some one, and I can't tell who, had told me that Mr. Kellam was a relative of Mr. Keith and was the agent for Mr. Keith.

So much of the foregoing answer as states what some one told the witness is objected to as incompetent, irrelevant, and immaterial.

489 Q. Did Mr. Kellam state anything in his conversation with you or tell you that he was not the agent for Mr. Keith?
A. Nothing; no, sir.

Recross-examination—questions by Mr. SMITH:

Q. This Brooks tract that you have mentioned in your redirect examination lies between the 6th and 10th street car lines, does it not?
A. It lies between 8th and 11th street-; it runs from 8th to 11th and between Buchanan and Lincoln.
Q. And a street railway line was projected at this time through the tract?
A. I think it was; yes, sir.
Q. Bounded on the east by Buchanan street?
A. Yes, sir.
Q. Taking the whole Brooks tract together that you have referred to, is it not mush more desirable than the same quantity—than the average—of the Keith tract?

A. It would have brought more money when it was sold in the market.

Redirect examination—questions by Mr. QUINTON:

Q. Is it not a fact that the 6th-street car line runs within two blocks of this Keith tract of land?

A. I believe it is within two blocks; it runs on 6th street.

Q. Does it not run west and beyond it?

A. Yes, sir.

T. L. STRINGHAM.

490 T. L. STRINGHAM, a witness for the complainant, was here recalled and testified as follows:

Direct examination—questions by Mr. QUINTON:

Q. I will ask you if in October, 1886, you offered to purchase this Keith tract of land—the one that was described to you this morning in your examination.

Objected to as incompetent, irrelevant, and immaterial.

A. I did in the fall of 1886; I think it was in October. That is my recollection now.

Q. What was the conversation at that time that you had with the parties that you went to see, Mr. Stringham?

Objected to as incompetent, irrelevant, and immaterial.

A. *M* Well, I had met Mr. Kellam, and he told me that that — was for sale, and I went down to see him and ask him the price, and I had some talk with him in regard to it. He did not give me a definite price at that time. He said he would see me later. That was the conversation the first time, and the next time I went down to see him was perhaps ten days later than the first time, and we came to a sort of understanding in regard to the price, which was $120,000 for the tract, and he was to reserve two lots of certain dimensions on the back end, but we never came to an agreement in regard to the payments. Mr. Kellam wanted more money down than I offered him and shorter time on the balance.

Q. What payments were those; what were the conditions?

A. I could not tell you exactly.

Q. Give us your best recollection.

A. According to my best recollection it was that I was to pay him $25,000 before the first of January—just how that was divided I don't remember—or within two or three months, and the balance of the payments were five-thousand-dollar payments, distributed along; some of them came once a month and some of them

491 in sixty days; but I could not give the details without my memorandum, just what my offer was.

Cross-examination—questions by Mr. SMITH:

Q. What was the cause of these negotiations falling through with?

A. Because I did not have money enough to pay down, I guess.

Q. Was that it or because the complainant commenced the present suit?

A. No; I was purchasing for the Interstate Land Company, and we did not have as much money to pay down as Mr. Kellam wanted, and I think perhaps three or four, perhaps six, weeks after that I met Mr. Kellam and we had another conversation, or rather renewed the negotiations, and I told him then that the company was not in a condition to even renew our offer—that is, to pay that money down—unless I could see some other parties. Well, then I commenced writing to some parties in Boston who wanted some property of that kind, but before there was anything done with it heard of this suit, and then of course everything was dropped.

Q. So the suit prevented the negotiations being carried on between you and Mr. Kellam finally?

A. I don't know. I never got that far along—that is, with the other parties—to get any. I don't know whether it would have gone through or not.

Q. Well, after learning of the institution of this suit there were no further negotiations between you and Mr. Kellam?

A. No, sir; the Interstate Land Company was never in a condition to take the land after the first of January.

Q. There was a very rapid rise in property of this character, was there not, during the latter part of the summer and the fall of 1886?

A. Well, I should say from the 15th of August until perhaps the first of September was the commencement of any rapid
492 rise. I should say the first of September was perhaps about as soon as there was much attention called to it or you could say there was a rapid rise; but after that time until the first of March there was, I should say, a very rapid rise in property.

T. L. STRINGHAM.

493 GEORGE W. WATSON, a witness on behalf of the complainant, being by me first carefully examined, cautioned, and solemnly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

Direct examination—questions by Mr. QUINTON:

Q. Where do you reside?

A. In the city of Topeka, Shawnee county, Kansas.

Q. How long have you resided in the city of Topeka?

A. Since 1878.

Q. What business are you engaged in in the city of Topeka?

A. Real estate.

Q. How long have you been engaged in that business?

A. Since 1879—the spring of 1879.

Q. I will ask you, Mr. Watson, if you are acquainted with and know of the tract of land commonly called the Keith tract, being described as the east half of the southeast quarter of section 25, township 11, range 15 east of the 6th P. M., and also a part of the

same section, being the east half of the northeast quarter, six and one-half acres, lying immediately north of it, making in all eighty-six and one-half acres.

A. Yes, sir.

Q. I will ask you if you were acquainted with and knew of this piece of land in 1886—during that year.

A. Yes, sir.

Q. Were you acquainted with the market value of property in the city of Topeka and about it during the year 1886?

A. Yes, sir.

Q. I will ask you to state, Mr. Watson, what the value of this property was in June or July last—what the market value of it was in June and July, 1886.

A. I think it was worth a thousand dollars an acre.

Q. I will ask you, Mr. Watson, if at any time during the
494 year 1886 you sought to purchase this piece of land.

A. Yes, sir.

Q. From whom?

A. From Mr. Kellam.

Q. About what time was this?

A. That is a question that I do not know whether I can answer. It must have been in July or the first part of August. I am simply stating that from knowing that it was about a month or such a matter before that deed was put on record to Holliday and Kellam or something in that neighborhood. I do not know just how long. I had some correspondence and telegrams at the time, but I have not kept them on file or anything. I could not from my books tell. I could not give the exact date, but it must have been in July or the first part of August or along in August some time.

Q. I will ask you, Mr. Watson, if you made Mr. Kellam an offer for that property at that time.

A. Yes, sir; I did.

Q. What was that offer?

A. I offered him $90,000 for the 86 acres.

Q. State what conversation took place between you and Mr. Kellam at the time you went to see him at this time, what you said to him, and what he said to you, as near as you can recollect it.

A. That is pretty hard to do.

Q. Give us the substance of it as near as you can recollect it.

A. As near as I can recollect I called on Mr. Kellam and asked him if the Keith tract was in the market and if there was a price on it, and as near as I can recollect the answer was that if I had any offer to submit it would be received, and I stated to Mr. Kellam that I had an offer to submit of ninety thousand dollars. Mr.
Kellam requested me to put that offer in writing, and I
495 stepped in to his desk and did so, and I made the offer in writing, ninety thousand dollars, and as to the terms of payment I have forgotten; it was not all cash, but part cash. I think—my recollection now is that it was thirty thousand dollars cash and the balance in payments running over two or three years' time.

Q. Did Mr. Kellam give any reason why there was not a price on the property then or why he would not put one on?

A. No; I don't think so. I don't think he gave any reason why there was no price on it. He made some remark that they were fixing up the title in some way, and that it was not complete in some way. That is all I remember about any reasons for not fixing the price.

Q. That, you say, was in July or the first part of August, as near as you can recollect?

A. I should say it was either the last of July or first part of August or along in that neighborhood closely, anyway. It was not far from that time.

Q. You know it was a month before the deeds were put on record, you say?

A. To the best of my recollection, about the time that the deeds were put on record. It must have been in the neighborhood of a month before that when I made that offer. Of course, when the deed went on record naturally my attention was called to it by publication in the paper, and it must have been in the neighborhood of a month; it might not have been a month, but it was in the neighborhood of a month.

Q. I will ask you, Mr. Watson, if you were authorized by parties prepared to buy that land at that time.

A. Yes, sir.

Q. I will ask you what you were authorized to pay for the land by parties prepared to pay for it at that time.

Objected to as incompetent, irrelevant, and immaterial.

496 The foregoing question is withdrawn by complainant.

Q. I will ask you how you came to go to Mr. Kellam to purchase this land, Mr. Watson.

A. Because I understood he was always considered the agent for the land; I so understood it.

Q. I will ask you if you ever had any dealings or transactions with him that led you to believe that.

A. Well, the only dealings that led me to believe he was agent further than simply common report that I had had with him with reference to that tract of land was this: I had always been for several years putting my cow in the pasture in there, and I have always paid Kellam or his son monthly rent for the pasture, and Mr. Kellam was always in charge of it, and I paid Mr. Kellam or his son for the rent. I supposed it was your son. It is the young man that collects the rent monthly.

Q. How long had you been renting cow pasture or pasturing your cow on this piece of land?

A. Well, whether it is two or three different years that I have had my cow in there I cannot say; but there has been a lapse. While I lived out in the country I did not have her in there; but every year that I have lived near enough to this pasture I have had my cow in there.

Q. You made the arrangements with Mr. Kellam, did you?

A. Yes, sir.
Q. And agreed with him on the price?
A. Yes, sir.
Q. Do you know whether other parties pastured their cows in there?
A. There was a number of cows in there every year. I do not know anything about whose they were, who they made arrangements with—anything of that kind.
Q. I believe you stated, did you not, that you made your arrangements with Mr. Kellam for pasturing your cow there?
497 A. Yes, sir; the first time when I put my cow in there.
Q. And paid him or some one representing him for it?
A. Yes, sir.

Cross-examination—questions by Mr. SMITH:

Q. You state, Mr. Watson, that your best impression is that this offer was made by you to Mr. Kellam in either the latter part of July or the first of August?
A. It was somewhere along in that neighborhood; now, it might be fifteen days one way or the other; I could not say; of course, I did not charge my memory with it; it was somewhere along in that neighborhood; it was some little time before that deed went on record to Kellam and Holliday.
Q. But you cannot say just how long before?
A. No, sir.
Q. Where were you when you made it?
—. In the gas office.
Q. Did you reduce it to writing?
A. Yes, sir.
Q. Do you remember whether or not it was dated?
A. I think it was dated; yes, sir; that is my impression now; it would be an accident if it was not, because I generally date things when I start them. I rather think it was dated.
Q. Did you sign your name to it?
A. Yes, sir.
Q. Individually or as agent?
A. I rather think individually, but I do not know now. I don't know just how I would have signed it.
Q. Did you ever have an interview with Mr. Kellam about it after that?
A. No, sir.
Q. You simply left it with him?
498 A. I left the offer with him; yes, sir.
Q. And never paid any further attention to it?
A. I don't think that I ever had any conversation with him about it after that; I don't think I did.
Q. At that time did he state who the owner of the property was?
A. I don't think there was anything said about who the owner of the property was at all.
Q. To whom was this statement directed, if to anybody?

A. I think I directed it to Mr. Kellam, or I may have just started off and said I hereby offer so much for that tract.

Q. The value that you place upon this property was what you considered it was worth for subdividing and selling lots, treating it as an addition, was it not?

A. Building purposes—selling and building.

Q. Were you personally familiar with the character of the north three-quarters of this tract?

A. Yes, sir; I don't know that I had been over this six and a fraction acres at that time, but the eighty I was acquainted with the whole tract, of course; had been all over it.

Q. What is the characteristic of the northeast quarter of the eighty, for instance?

A. Well, the northeast twenty of the eighty is cut up with a big ravine—a wash that goes down through it—two of them, in fact.

Q. Two ravines?

A. Yes, sir; one coming from along the east line and running northwest and the other from towards the center, running northeasterly.

Redirect examination—questions by Mr. QUINTON:

—. Mr. Watson, was not this piece of land valuable and in demand for resident purposes in the month- of June and July, 1886?

499 A. Yes, sir.

GEO. W. WATSON.

The further taking of testimony was here adjourned until two o'clock p. m., October 6th, 1887, at the same place.

LESTER S. WILSON, *Examiner.*

Parties met pursuant to adjournment, and present as before.

J. G. WOOD, a witness on behalf of the complainant, being by me first carefully examined, cautioned, and solemnly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

Direct examination—questions by Mr. QUINTON:

Q. Where do you live?

A. Topeka, at the corner of Third and Clay extended.

Q. Shawnee county, Kansas?

A. Yes, sir.

Q. How long have you resided in Topeka?

A. The last time I have resided here since the summer of 1880; I have lived there all the time.

Q. I will ask you, Mr. Wood, if you are acquainted with the defendants in this action, E. P. Kellam and C. K. Holliday.

A. Yes, sir; I know the gentlemen.

Q. Are you acquainted and know of the tract of land commonly called the Keith tract, being described as the east half of the southeast quarter of section 25, township 11, range 15 east of the 6th P.

M., and also six and one-half acres lying immediately north of it, being a part of the east half of the northeast quarter, in all eighty-six and one-half acres?

A. I don't know it by that description, but I know very well what is known as the Keith tract; it is immediately west or within a few rods of my west line.

Q. I will ask you if you ever pastured any cattle on that tract of land.

A. I pastured my cow there last summer.

500 Q. From whom did you get the permission?

A. Well, I went to Mr. Kellam in the early spring—I don't remember about what time it was now, along probably in May—and I asked him what the pasture would be for my cow per month, and he said that he had not the control of that; that he had sublet the matter, the control of the pasture, the care of the pasture, etc., to Mr. Conkling, who lives out at the north end of Buchanan street, next to the tract. I then went to Conkling and engaged the pasture, had the pasture for some six months, and paid him $2.50 per month.

Q. I will ask you if you ever were interested or connected in any manner with parties seeking to extend 3rd or Second street through this tract of land.

A. Yes, sir; as a citizen in that neighborhood and as school director of district 83, the director of the board, I was interested in opening up a road through the Keith tract to connect with Potwin place, immediately west of the Keith tract.

Q. I will ask you if that road was an extension of any street in the city.

A. Well, yes; it would have been an extension of 2nd street along the line of the school property.

Q. I will ask you who you went to see about getting a road through there.

A. Well, the first thing we did was to petition for the road, petition the county commissioners, and they appointed viewers to view the road, and they made their report.

Q. I will ask you if you went to see any one about it.

A. Not before the view.

Q. Well, at any time.

A. I had a chat with Mr. Kellam after the view in regard to the damages. I had understood that he had claimed damages of fifteen thousand dollars for getting across there.

501 So much of witness's answer as gives his understanding of what Mr. Kellam claimed is objected to as incompetent, irrelevant, and immaterial.

Q. Did you go and see Mr. Kellam about it for the purpose of seeing him about this road?

A. No; I did not go to see him. I met him on the street and had a chat with him at the corner of 5th and the avenue. I was trying to persuade him that he ought to let us go through there with the road.

Q. Why did you address your conversation to him about it?

A. Because he had been looking after the thing. He was, as I understood it, the agent of the property.

So much of witness's answer as gives the witness's understanding is objected to as incompetent, irrelevant, and immaterial.

WITNESS: And knowing that Mr. Keith was not a resident here and Mr. Kellam probably being well acquainted with him was probably a spoke in the wheel that would bring success to us. I interviewed him and tried to persuade him that the best thing to do was to have the road opened and go through. I told him it could not be used for farm property and that its only value would be in residences, and that a man in buying property there of course would have to buy it according to the streets and alleys as they would probably be, and that they could not realize any more from the individual buying whether the streets or alleys were reserved on him in the deed or whether he bought them to the streets and lines of the alleys, and the-efore it would be worth as much to him in that way as it could possibly be the other, and it would be a great convenience to the folks and of great convenience to let us go through there. It was no use to talk about the county paying fifteen thousand dollars; they would not do it.

All of the foregoing answer of the witness after the last objection is objected to as incompetent, irrelevant, and immaterial.

502 Q. State the rest of the conversation that you had with him about it.

A. Well, he said that Mr. Keith was not ready yet to determine what he should do with the property—something to that effect; I do not remember his exact language—and that as acting for him he would have to decline such a proposition; that was simply a friendly chat in a persuasive way.

Q. He stated as acting for Mr. Keith he would have to decline the proposition?

Objected to as leading.

A. He said that in substance. I don't remember his exact language.

Q. Did you ever rent pasturage before or after the time you speak of?

A. I asked Ed. last spring. I told him that last summer I thought I had paid a good deal for pasturage, although it was a great accommodation to me, and I asked the privilege of turning my cow in there this summer for nothing. He kind of hesitated, and I told him it had grown up with weeds and that there was very little pasturage there, and he finally consented I should turn her in, and I did so, and she has been there ever since. It was very kind on his part and has been of great service to me.

Q. Did you ever see him or have any other conversation with him about putting this road through there than the one you have related?

A. No; I think not; only maybe just a mere suggestion that he had better put it through when I would pass him on the street. He was not disposed to do it.

Cross-examination—questions by Mr. SMITH:

Q. What year was it that you had this conversation with Mr. Kellam about the road?

A. Well, it was after the second petition that we had. I
503 don't remember the year.

Q. Was that in 1885?

A. I think perhaps it was in 1885, in the spring, or at the time we had the petition. It was the last time the petition was presented. We had two petitions presented to the board.

Q. Was that the time that Mr. Kellam told you that Mr. Keith was not ready yet to have the road go through there?

A. Yes sir; in that conversation. I never had but the one conversation that amounted to anything about the road, and I say I do not remember the exact time, but I think it was that time—in 1885.

Q. In your direct examination you speak of Mr. Kellam objecting to have the road go through there as acting for Mr. Keith. Did he use those words?

A. Well, he said that Mr. Keith was not ready, or that, acting for Mr. Keith, he mentioned Mr. Keith in connection with it. They were not ready yet to determine just what would be done with the property and just how it would be done, and therefore they did not want to establish any precedents that would perhaps give them trouble.

Q. That is, Mr. Keith was not ready to have the road opened yet?

A. Yes, sir; that was the expression.

Q. Did he use the expression as acting for Mr. Keith?

A. Well, as acting or as representing him; something to that effect. I do not give the exact language now. I do not pretend to. It was just a general chat on the street and in a very friendly way.

Q. This was some two and one-half years ago?

A. Yes, sir.

Redirect examination—questions by Mr. QU-NTON:

504 Q. I will ask you if while such director you had occasion to purchase any property in that vicinity for school purposes?

A. After our district was organized the board had occasion to buy an acre of ground for school property to build a school-house on.

Q. Situated close to this tract of land?

A. It joins this tract on the east about the center of the line north and south; just a hedge fence between them.

Q. What was that acre of land worth at that time; what did you have to pay for it?

Objected to as incompetent, irrelevant, and immaterial.

A. We paid $1,300 for the acre from J. H. Stevenson.

Q. Was that its value at that time?

A. That was the lowest figure we could get it for, and we had to have it. The district had voted that we should buy it there.

Recross-examination—questions by Mr. SMITH:

Q. The district had to have it?
A. The district had to have an acre of ground. The law requires a school district outside of a city to have an acre of ground, and we had to buy an acre in the district.
Q. Was that the only acre that you could purchase?
A. We could have purchased other acres, but that seemed to be the most desirable that we could purchase.
Q. And paid $1,300 for it?
A. Yes, sir.
Q. When was this?
A. This summer four years ago.
Q. Do you know the market value of the Keith tract of land out there?

Objected to as not proper cross-examination.

A. Yes, sir; I should think I did. I have a good knowledge of land in that direction.

505 Q. I will ask you, Mr. Wood, if that was a fair and reasonable value of land at that time—$1,300 an acre—the same that you paid for that acre of ground.

Mr. QUINTON: I will withdraw that question and ask you what you considered the value of that land at that time—the Keith tract in 1886.

A. Oh, well, it is easily worth a thousand dollars an acre of any man's money, the whole tract taken together.
Q. Was it in 1886?
A. Yes, sir; any time in 1886.

J. G. WOOD.

506 H. C. LINN, a witness on behalf of the complainant, being by me first carefully examined, cautioned, and solemnly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

Direct examination—questions by Mr. QUINTON:

Q. Where do you reside?
A. I live on West 6th street.
Q. Topeka, Shawnee county, Kansas?
A. Yes, sir.
Q. Are you acquainted with what is commonly known as the Keith tract of land, described as the east half of the southeast quarter of section 25, township 11, range 15 east of the 6th P. M., and also the six and one-half acres lying immediately north of it, being a part of the east half of the northeast quarter of the same section, in all eighty-six and one-half acres?
A. I probably know the piece of land that you have reference to.

Q. I will ask you if you were acquainted with the value of property in and about Topeka in the year 1886.

A. Well, some little, I suppose I was.

Q. I will ask you what the value of this piece of land was in the month- of June and July, 1886.

A. Well, I would suppose it was probably worth a thousand dollars an acre, the way land was selling at that time.

Cross-examination—questions by Mr. SMITH:

Q. You say it is worth a thousand dollars an acre at this time, the way land was selling. What land was there selling of this character—in tracts as large as this?

A. Well, I was judging probably from the way Potwin was selling his land there and other land that was being sold.

Q. How was Potwin selling his lands?

A. I think he was selling it at from $1,300 to $1,500 for a
507 half acre, and then there was some land sold out across from me at $1,500 an acre.

Q. Do you say the Potwin lots were half an acre or an acre?

A. Half an acre, I think, or perhaps a little over a half.

Q. Wasn't it seven-eighths of an acre?

A. Well, I was informed they were something over half an acre. I don't know the size.

Q. This Potwin property that you speak of had been platted, streets laid out and trees placed on it, and extraordinary inducements offered to purchasers in the way of extending credit, furnishing capital to build with on long periods of time at a low rate of interest, was there not?

A. I think so; yes, sir.

Q. Is it owing to the price that the Potwin lots were selling at that you estimate that the Keith property at that time was worth one thousand dollars an acre?

A. No; not exactly. You ask me what was selling. I think Dr. Martin sold four acres out there for $1,500 an acre—out across from where I live.

Q. Was that not some time in June, 1886?

A. It might have been somewhere about that time. I think not a great while from that.

Q. Was not that along the latter part of August, 1886?

A. I don't remember the time. It was somewhere along in the summer.

Q. Do you know of any large tracts of land, consisting of 70 or 80 acres, that was selling for any such price as a thousand dollars an acre at this time?

A. No, sir; I do not. I don't know of any such large tracts of land.

Q. Then you estimate the value of the Keith property from what you knew of small tracts of land being sold?

A. From the surroundings; what the lots were being sold —
508 in that country. I should think that there would have been considerable money in it at a thousand dollars an acre.

Q. For subdividing and selling lots?
A. Yes, sir.

Redirect examination—questions by Mr. QUINTON:

Q. Mr. Smith asked you what you understood to be the terms upon which the Potwin lands were sold. Did you not also understand that one of the conditions of selling the property was that it should be built upon within six months or some short time?
A. Yes, sir; I understood that.

Recross-examination—questions by Mr. SMITH:

Q. Would not that condition itself necessarily increase the value of other lots that were not sold?
A. Yes, sir; every building that was put up would have a tendency to increase the value of other lots—to put up a nice building.

Redirect examination—questions by Mr. QUINTON:

Q. Did it not also, by reason of the buildings which were built along the west line of the Keith tract, also tend to increase the value of the Keith tract?
A. I think so.

H. C. LINN.

509 D. N. BURDGE, a witness on behalf of the complainant, being by me first carefully examined, cautioned, and solemnly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

Direct examination—questions by Mr. QUINTON:

Q. What is your name.
A. D. N. Burdge.
Q. What official position do you occupy?
A. County clerk.
Q. Of what county?
A. Shawnee county.
Q. As county clerk of Shawnee county have you in your office and in your possession the paper which you now hold in your hands?
A. Yes, sir; this is one.
Q. Will you please hand that to the examiner?
A. Yes, sir.

Mr. BERGEN (to the attorneys for the defendants): I would ask you whether you admit the signature of E. P. Kellam to this to be the genuine signature of the defendant E. P. Kellam without further proof.

The reception of the paper referred to is objected to by the defendants as incompetent, irrelevant, and immaterial.

Mr. SMITH: We do not admit that M. C. Keith is in the handwriting of Mr. Kellam, the defendant, but will admit that it is the signature of Mr. Keith himself.

Mr. BERGEN: What do you say as to the words below the name M. C. Keith, "by E. P. Kellam, ag't"? Is that admitted to be the handwriting of the defendant E. P. Kellam?

Mr. SMITH: No, sir; it is not admitted.

Mr. SMITH: If the plaintiff will admit that the name M. C. Keith is in the handwriting of the complainant, then the defendant will admit, for the purposes of this suit, that the words
510 "by E. P. Kellam, ag't," are in the handwriting of the defendant Kellam; otherwise not.

Mr. BERGEN: The complainant so admits.

The complainant here offers in evidence said paper, which is in words and figures following:

"$203. TOPEKA, KANSAS, *Dec.* 22, 1884.

Received of A. J. Huntoon, treasurer of Shawnee county, Kansas, the sum of two hundred dollars on account of condemnation of right of way and damage across lot # one (1), sec. 25, town. 11, range 15 east, as set forth in the report of the commissioners of right of way, filed in the county clerk's office August 21, 1882, the same having been condemned for the use of the Topeka, Salina and Western Railroad Company.

M. C. KEITH,
By E. P. KELLAM, *Ag't.*"

To the reception of which paper in evidence the defendants, by their solicitors, object as being incompetent, irrelevant, and immaterial.

Q. Are you willing that the original paper shall be left with the examiner and attached to this deposition?

A. I should prefer keeping it on file in the office. I object to its being left outside of the office.

Q. Just give me the answer you made a little while ago. You said then that you deemed it your legal duty not to let it go out of your possession.

A. Yes, sir.

Q. Your duty under the law?

A. Yes, sir.

Q. As county clerk of the county of Shawnee have you the legal custody of papers relative to applications for the location of county roads in Shawnee county?

A. I have; yes, sir.

511 Q. Among such papers do you find the paper which you now hold in your hands?

A. I do; yes, sir.

Q. Is that among the papers in your office relative to the application for laying out a county road in Shawnee county?

A. Yes, sir; known as the Wood road.

Q. It is known as the L. M. Wood road?

A. I think it is known on the records as the Wood road.

Q. Well, petitioned for by L. M. Wood?

A. Yes, sir; he is the principal petitioner.
Q. Are you willing to part with the possession of that paper?
A. No, sir.
Q. Will you hand it to the examiner to be copied?
A. I do; yes, sir.

The complainant now offers in evidence said paper and requests the examiner to copy the same.

To the reception of which paper in evidence the defendants, by their solicitors, object for the reason that it is incompetent, irrelevant, and immaterial.

Question by complainant's to defendants' solicitors. Do you object because the complainant has not proved that the signature E. P. Kellam upon that paper is the genuine signature of E. P. Kellam?

Mr. SMITH: Defendants' solicitors admit that it is his signature; the objection is not on that ground.

Said paper is in words and figures as follows:

"NOVEMBER 15, 1884.

To A. W. Knowles, W. W. Phillips, and C. F. Kendall.

D'R SIRS: I do hereby claim damages in the am't of two
512 thousand dollars ($2,000) if road known as the L. M. Wood road, Topeka township, is located across my land, being the E. ½ of southeast ¼ of sec. 25, town. 11, range 15 east.

Yours resp'y, M. C. KEITH,
By E. P. KELLAM, *Ag't.*"

Mr. BERGEN: I would ask defendants' solicitors whether it is admitted that the whole paper last offered is in the handwriting of E. P. Kellam.

Mr. SMITH: If that is the truth it is. Defendant Kellam states that it is in his handwriting, and it is so admitted.

D. N. BURDGE.

The further taking of testimony was here adjourned until Saturday, October 8th, 1887, at one o'clock p. m., at the same place.

LESTER S. WILSON, *Examiner.*

513 SATURDAY, *October 8th*, 1887—1 o'clock p. m.

Parties met pursuant to adjournment.

Present as before.

SAMUEL K. CROSS, a witness on behalf of the complainant, being by me first carefully examined, cautioned, and solemnly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

Direct examination—questions by Mr. QUINTON:

Q. State your name.
A. Samuel K. Cross.

Q. Where do you reside?
A. Near the city of Topeka, in Potwin place.
Q. Shawnee county, Kansas?
A. Yes, sir.
Q. How long have you resided in the city of Topeka?
A. Well, off and on for 22 years.
Q. Were you acquainted with the market value of property in and about the city of Topeka in the year 1886—last year?
A. Yes, sir.
Q. I will ask you, Mr. Cross, if you are acquainted with what is commonly known as the Keith tract of land, more particularly described as lying northwest of the city of Topeka and being the east half of the southeast quarter of section 25, township 11, range 15 east of the 6th P. M., and also a part of the east half of the northeast quarter of the same section lying immediately north of it, containing six and one-half acres, in all eighty-six and one-half acres?
A. Yes, sir.
Q. I will ask you, Mr. Cross, to state what the market value of this land was in the months of June and July, 1886?
A. Well, I thought the piece as a body was worth one hundred thousand dollars.

514 Cross-examination—questions by Mr. SMITH:

Q. At what time in June or July?
A. Well, now, I can't say as for the month, but I know in the summer. One reason what makes me know, I happened to be discussing it with a man; he and I were talking the matter over.
Q. Would it be worth more in July than June?
A. Possibly it might a little, as all property increased some.
Q. There was quite an increase in valuation in suburban property in Topeka in the summer of 1886, was there not?
A. The summer and fall—well, not so much in the summer; in the fall I think it did commence going up.
Q. How do you determine in your own mind as to the market value of a piece of property of this character?
A. Well, I always determine it from about what a person could make out of it, and another is for what the property was selling.
Q. Was any property of this character selling in the market in Topeka during June and July, 1886?
A. Yes, sir; this Potwin place.
Q. That was not sold in one entire lump, was it?
A. No, sir.
Q. That had been subdivided and selling in lots a long time?
A. Yes, sir.
Q. Extraordinary inducements in regard to Mr. Potwin furnishing purchasers with means to build with were offered, were they not?
A. Yes, sir. Well, I govern it a good deal by some that I had adjoining it that I was selling lots just before that.
Q. How were you selling?
A. I sold it in about 2½-acre lots.

Q. Do you know of any property consisting of 70 or 80 acres
515 being sold in one lump at this time?

A. No; I don't think I do; not at that time, just now.

Q. Then there was no market for property of this kind in one entire lump, was there, in June and July, 1886?

A. Oh, yes; think if property was for sale they could have found purchasers.

Q. Do you know of any property that was sold comprising 70 or 80 acres in one piece?

A. I don't know as I do—that is, a little over a year ago.

Q. What would you consider the value of the south 40 acres of this property in June or July, 1886?

A. Well, I should consider it worth about $1,500 an acre.

Q. What would the east half of the remaining 46 acres be worth?

A. Oh, I should say about $35,000—no, not that; I meant about——

Q. Per acre?

A. Well, I should judge it would be worth between $800 and $1,000 an acre.

Q. Do you remember the character of the east half of the north 46 acres?

A. Yes, sir.

Q. Pretty low, is it not?

A. Some of it is.

Q. That would not be worth $700 or $800 an acre, would it, the low part of it?

A. No, not the lowest; but that hillside is about as good as the other part.

Q. What would the west half of the north 46 acres be worth?

A. It would be worth about $1,200.

Q. An acre?

A. Yes, sir.

516 Q. In June or July, 1886?

A. I should think so. I sold some of the same kind in 1885 for one thousand dollars an acre.

Q. Where-bouts was it?

A. Just a little west of their west piece.

Q. That is, facing the Potwin place?

A. Yes, sir; north of the Potwin place.

Redirect examination—questions by Mr. QUINTON:

Q. You say you sold some lots in 1885 for a thousand dollars an acre. Is it not a fact that this tract of land lies between the piece you sold and the city?

A. Yes, sir.

Q. I will ask you, Mr. Cross, if you sought to purchase this piece of land at any time during the year 1886.

A. No, sir; I did not in 1886.

S. K. CROSS.

517 J. L. CONKLING, a witness for the complainant, being by me first carefully examined, cautioned, and solemnly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

Direct examination—questions by Mr. QUINTON:

Q. Where do you reside?

A. 417 Lincoln street, Topeka.

Q. Do you know the tract of land of about 86 acres which lies east of Potwin place and west of the main part of the city of Topeka?

A. Yes, sir.

Q. Known as the Keith tract of land?

A. Yes, sir.

Q. How far from that do you live, Mr. Conkling?

A. That land adjoins my place on the north, between Lincoln and Lane.

Q. What, if anything, have you had to do with the care or use of that land at any time before this present summer?

A. I have had it leased two years, I believe, for a pasture, and I have had the care of the fence for several years, to keep the stock in; since 1876, I think.

Q. For whom were you acting in caring for the fence?

A. Mr. E. P. Kellam.

Q. You say you had charge of that since about 1876?

A. I think about that time; I have kept the fence up since then.

Q. For how many years have you had charge of the matter of pasturing it?

A. Two years I had it leased; two seasons.

Q. What seasons were they?

A. I can't remember the date of the first. The last season I had it was 1886. I had it last season; before that I can't remember the date.

518 Q. What was your arrangement with Mr. Kellam about the pasturage?

A. Well, I was to pay him so much for the season and keep up the fence for myself.

Q. How much were you to pay him?

A. The first year I paid him $75 for the season, for the use of it, and last year I paid him $131.50 I think it was. I am not just positive of the cents, but it was about $131.

Q. That is, for the year 1886?

A. Yes, sir.

Q. Aside from those years did you have anything to do with the pasture?

A. Nothing except keeping up the fence.

Q. Did you determine what cattle should go in, or have anything to do with the collecting of rents?

A. No, sir; had nothing to do with that. I did collect some at the gate, but it was persons that wanted to pay it there instead of going to Mr. Kellam.

Q. For pasture?
A. Yes, sir.
Q. To whom did you pay the money that you collected in the years other than those that you rented it?
A. To Mr. Kellam.
Q. And collected it for him?
A. Yes, sir.
Q. About how many cattle, Mr. Conkling, were there in there at one time?
A. Well, that would be pretty hard to tell, they were coming in and going out so much. The first year that we opened the pasture there was very little done. There was but few cattle in, and I could not say how many, but I don't think he took in over $40 altogether; that is my impression now.
519 Q. The first year?
A. Yes, sir; but the next year was better, but I would think that it would average in the neighborhood of thirty head for the season; sometimes there was more in than that, and other times there was less, but I think it would average somewhere near 30 head.
Q. What time would the season commence?
A. A favorable season would commence about the first of April, and sometimes not until May.
Q. About what time would the season close?
A. About the first of October; sometimes it would run into the middle of October; altogether owing to the season.

Cross-examination waived.

J. L. CONKLING, a witness for the complainant, was here recalled, and testified as follows:

Direct examination—questions by Mr. QUINTON:

Q. Do you know anything about the fence which was first built on the north line of this tract of land?
A. Yes, sir.
Q. By whom was that built?
A. Well, Mr. Kellam and I put the wires up, but I can't remember who set the posts.
Q. Out of what material was it built?
A. The posts were got there on the ground—on the land; Mr. Kellam furnished the wire.
Q. How many wires were on it?
A. Three.
Q. What kind of wire?
A. It was just a plain wire; no barbs on it.
Q. How much did that cost per rod, Mr. Conkling?
A. Indeed, I could not say; I never bought any; if I
520 should say, I would have to guess at it, because I do not know.
Q. Did you ever buy any wire?

A. I never bought any of that kind. I have bought barbed wire.

Q. Which costs the most, barbed or plain wire?

A. I would think the barbed wire cost the most.

Q. How much would it have cost if made with barbed wire?

A. Well, it would cost about 8 or 8½ cents a pound, the barbed wire, I would think.

Q. And do you know how many pounds to the rod?

A. I think it is calculated about a pound to the rod, but it will not quite hold out. I have bought the barbed wire; that is what is calculated on, but it don't quite hold out.

Q. And how much did you say the barbed wire was worth?

A. About 8 or 8½ cents I think I paid the last I bought.

Q. Then outside the cost of the posts—the material in the posts—how much per rod would that fence cost if it had been made of barbed wires?

A. To put it up outside of the posts and wire?

Q. No; outside of the posts.

A. I should think it would cost in the neighborhood of about 35 cents a rod.

Q. For all the material and all the work, except the material in the posts?

A. Yes, sir; all the work except the posts and putting the wire up, I should think it would cost in the neighborhood of that.

Q. How much would all the work of building the fence and the cost of the wire be worth?

A. Not including the posts?

A. Not including anything for the material of the posts.

A. Well, about 35 cents a rod, I should think. The wire and the labor, I would think, would cost 35 cents a rod.

521 Q. The wire and the labor of setting the posts and digging the holes and putting the wire on would cost about 35 cents a rod?

A. Yes, sir.

Q. Have you had experience in putting up barbed wire, Mr. Conkling?

A. I have put up some; not a great deal.

Q. And you know the cost?

A. Well, I would not want to do it for much less than that.

Q. I will ask you if you know the expense.

A. Yes, sir.

Q. And the smooth wire is cheaper than the barbed wire?

A. Yes, sir; it would not cost as much as the barbed wire.

Cross-examination—questions by Mr. SMITH:

Q. Does that estimate of 35 cents a rod include the costs of getting out the posts?

A. No, sir; that is just for digging the holes, setting the posts, and putting on the wire and buying the wire.

Q. What would be the additional cost of getting out the posts?

A. Well, I suppose it would cost about 4 cents apiece to get them out there in that timber on that land.

J. L. CONKLIN.

522 E. P. KELLAM, a witness on behalf of the complainant, being by me first carefully examined, cautioned, and solemnly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

Direct examination—questions by Mr. BERGEN:

Q. What is your name?
A. Edward P. Kellam.
Q. What is your age?
A. I am 55 years of age.
Q. Where do you reside?
A. Topeka, Kansas.
Q. How long have you resided in Topeka?
A. Thirty years.
Q. Are you acquainted with the complainant in this action, Morrell C. Keith?
A. Yes, sir.
Q. How long have you been acquainted with the complainant?
A. Since 1857.
Q. Where does he reside?
A. He resides at North Platte, Nebraska.
Q. How long has he resided there?
A. Well, I could not say how long.
Q. Did you see him in the spring or summer of the year 1886?
A. In the spring or summer?
Q. Yes, sir.
A. No, sir; I did not.
Q. What relationship, if any, do you sustain to Morrell C. Keith, the complainant?
A. Mrs. Kellam, my wife, is a niece of his wife; his wife was an aunt of Mrs. Kellam.

Q. Had your wife been a member of his family until about
523 the time of your marriage?

A. I do not know that.
Q. Had she grown up in his family as a young woman, do you know, as a girl?
A. I could not say.
Q. What is the best of your information upon that, Mr. Kellam?
A. Well, she came here with his family into Topeka the first time I met her.
Q. When was that?
A. In 1857; how long she lived in his family I could not say; I never knew that I know of.
Q. How long after she came here until you were married?
A. We were married in 1863.
Q. Had she made her home with the complainant and his family until that time?

A. Yes, sir; I think she had.
Q. From 1857 to 1863.
A. Yes, sir; I believe so.
Q. Did you ever live at North Platte, Nebraska?
A. Only a short time.
Q. Were you there in the same house at which Mr. Keith made his home?
A. Yes, sir.
Q. How long since you have known of his being in Topeka or Shawnee county?
A. Really, I don't remember; I should think it must be 15 or 16 years to the best of my remembrance.
Q. When, so far as you know, was the first improvement placed upon the land in controversy?

524 Objected to as incompetent, irrelevant, and immaterial, and for the reason that the question assumes that the land has been improved.

A. I do not know that I could answer that with any degree of certainty; it seems to me it was in the year 1876.
Q. What was the nature of that improvement?
A. It was a fence—a fence on the south line.
Q. Were there already fences on the east and west lines?
A. There were; yes, sir; but not all the way; a portion.
Q. Was there any fence on the north line at that time, or near the north line?
A. I don't think there was; I could not say.
Q. By whom was the fence on the south line of the premises placed there?
A. It was placed there by my orders.
Q. Did any one else request you to have it made there?
A. Yes, sir.
Q. Who?
A. Well, I suppose it came through Mr. Keith; he paid for the fence.
Q. Mr. Keith paid for that fence.
A. Yes, sir.
Q. You had it placed there for him?
A. Yes, sir.
Q. Have you ever made any use of that land, Mr. Kellam?
A. Yes, sir.
Q. When did you first commence making a use of it?
A. Well, I should say about 1876.
Q. To what use did you put it?
A. For pasture purposes.
Q. Did you let others pasture their stock upon it also?
525 A. Yes, sir.
Q. About how many head of stock have been pastured there each year since then?
A. Well, I don't know. I should think an average of fifteen to twenty head, perhaps, in the summer months.

Q. Do you think no more than twenty head have been pastured there?

A. Possibly more, but I think on an average in the summer months for pasture there might be some more in some months and fewer in other months.

Q. Have you had some of your own stock on there in every year since you commenced using it?

A. Not every year—no, sir; but every year that I have had a cow of my own I have pastured there.

Q. Did you charge those who pastured their stock there, Mr. Kellam?

A. I did.

Q. How much did you charge them?

A. Well, for several years a dollar a month, and within the last, perhaps, two or three or four years—I could not remember—two dollars and a half per month.

Q. Do you know about the paying of taxes on this land, Mr. Kellam?

A. Yes, sir.

Q. By whom have the taxes been paid upon it from year to year for the last 25 years?

A. By Mr. Keith—not for the last 25 years. Do you mean who furnished the money?

Q. I will ask you another question—well, go on with your answer.

526 A. I will answer a little differently. All the while that the land was owned by Mr. Keith—that is, in his name—it was paid by Mr. Keith; but there was two or three years—I do not remember how many—that the land was disposed of, and it has been paid by the party owning it then; but except those years Mr. Keith has paid the taxes.

Q. For how many years would you say before the present he has paid the taxes continuously?

A. Well, I should say 20 or 21 or 22 years; somewhere along there. I do not exactly know how long the land was out of his possession.

Q. Who paid them for him?

A. I did.

Q. At every payment that was made did you pay them since Mr. Keith has owned it?

A. Well, nearly, I should think. I could not say for every year.

Q. Did you for Mr. Keith collect the damages which were assessed on account of the Topeka, Salina and Western railroad running through a part of this land?

Objected to by defendants' solicitors for the reason that it is assumed that damages have been collected.

A. I do not understand, Judge. My collecting them——

Q. The question was, Did you for Mr. Keith collect the damages which were assessed on account of the Topeka, Salina and Western railroad running through a part of this land?

Same objection.

A. What do you mean by that—collecting them from who?

Q. From the county treasurer of Shawnee county, with whom the money had been deposited.

A. Yes, sir.

Q. You collected the money for him?

A. I collected the money—yes, sir.

527 Q. About what time was that?

A. Well, I don't know; I could not say without refreshing my memory in regard to dates. That money laid in the county treasury for two or three years before he ordered me to get it. He contemplated fighting the road and not letting them take the land, and finally I collected it and turned it in for taxes one year; what that was I don't remember.

Q. Did you in his behalf resist the laying out of a county road which had been petitioned for through the land?

A. Yes, sir.

Q. Did you on more than one occasion?

A. I did.

Q. Did you in his name make claim for damages if such a road should be laid out through it?

A. I did.

Q. And as his agent?

A. Yes, sir; on that business I was his agent.

Q. Did you collect the money for the pasturage of this land so far as it was collected, Mr. Kellam?

A. Yes, sir.

Q. Did you lease this land or any part of it to a base-ball club in the year 1885?

A. Yes, sir.

Q. For how much?

A. One hundred dollars for the season.

Q. What, if any, improvements did they erect upon it.

A. The base-ball association?

Q. Yes, sir.

A. They fenced the yard and their stand, etc., and whatever was necessary for their purpose.

Q. Put in seats with a roof over them?

528 A. Yes, sir.

Q. With a high tight board fence about it?

A. I cannot say when they did fence it; of course they did not have it in 1885; I had 1886 in my mind. It was last year the first year they had the ball club there. I was simply mistaken. I did not wait long enough before I answered your question. It was 1886; I know now.

Q. How long prior to their occupancy of it had you leased it to them?

A. I think they took it some time in the spring of 1886, so that they had the use of it.

Q. How long before that had you agreed to lease it to them?

A. I don't know what month it was that they decided to take it for the base-ball ground.

Q. Has Mr. Keith had any other person here in charge of it or looking after this land during the time you have mentioned, Mr. Kellam?

A. I do not know that he has.

Q. Did you erect any other fence on that land than the fence on the south end?

A. Yes, sir.

Q. When did you put that there?

A. Well, I could not say what year.

Q. How long before or after the fence on the south end was placed there?

A. I think I fenced a portion of it soon after; perhaps the next year; I could not say.

Q. How much did that fence which you placed there, aside from the south fence, cost?

A. I could not say what it cost.

Q. How much of it was there?

529 A. There was a fence across the north end; that would be the same length it would be across the south end. That would be across 80 acres—80 rods—wouldn't it? And then I should think there was perhaps 20 or 30 rods on the west line.

Q. Well, about how much did that fence cost?

A. Oh, I should say a dollar a rod.

Q. Did you get the material off of the ground—the wood that was necessary for the fence?

A. The posts; yes, sir.

Q. And you should guess that it cost a dollar a rod, would you?

A. Yes, sir; in that neighborhood, I should think.

Q. Have you used any posts or wood off of this land, Mr. Kellam, yourself?

A. For my own use?

Q. For your own use.

A. Yes, sir; posts only.

Q. Have you sold any wood or posts off of it, Mr. Kellam?

A. No, sir.

Q. Have you ever had any fire-wood off of it?

A. No, sir.

Q. During the summer time, Mr. Kellam, for the last ten years, about how often have you been on the land?

A. That is a pretty hard question to answer how often I have been on the land for the last ten years.

Q. Have you not seen it about as much as once a week during the summer time?

A. No, sir; I have not been out there now for the last three weeks.

Q. Do you know the defendant C. K. Holliday?

A. Yes, sir.

530 Q. How long have you known him?

A. Since 1857—about 30 years.

Q. What, if any, relationship by blood or marriage do you sustain to him?

A. I do not know as I sustain any. Not any I should answer.

Q. Did a nephew of yours marry a daughter of his?

A. No, sir.

Q. There is then no relationship, however distant, existing between you by blood or marriage?

A. No, sir; well, I should say not; I never thought I was related to him by blood or marriage.

Q. Is Mr. T. J. Kellam related to Col. Holliday?

A. Yes, sir; I believe he is.

Q. In what way?

A. He is a son-in-law.

Q. And how is Mr. T. J. Kellam related to you?

A. He is a second cousin.

Q. Have you a place of business in this city, Mr. Kellam?

A. Yes, sir.

Q. Where is it?

A. With the gas company—Excelsior Coke and Gas Company.

Q. Did you have your place of business there during the year 1886?

A. I did.

Q. How long previous to that had you had your place of business there?

A. I think it was in 1883 that I went there; some time during that year.

Q. Are you and have you been since then employed by the gas company?

A. I have.

Q. Who is the president of the gas company?

531 A. C. K. Holliday.

Q. How long has he been president of the gas company?

A. I do not know.

Q. Has he been ever since 1883?

A. Yes, sir.

Q. Is he the principal stockholder in the gas company?

A. I do not know. My impression is that he is the principal stockholder.

Q. Do you keep the books of the company or assist in keeping them?

A. I do.

Q. Is he very frequently at the office?

A. He is.

Q. Where is the office—in what building?

A. It is on the corner of 5th and Kansas avenue—the northwest corner, over what is now the State National bank.

Q. Who owns and has owned the building for several years?

A. Col. Holliday owns it now.

Q. Has he owned it for the last three or four years?

A. I believe he has.

Q. Has he a private office in the same building?

A. He has.
Q. Upstairs?
A. Yes, sir.
Q. And adjoining the gas company's office?
A. It is.
Q. With a door between them?
A. Yes, sir.
Q. Have you in the years 1883, 1884, 1885, and 1886 acted as personal agent of Col. Holliday in any of his individual business?

Objected to as incompetent, irrelevant, and immaterial.

A. When he was away I have received money for him from parties who would come in on his private account.
532 Q. For rents and on contracts for land that he has sold?
A. Yes, sir.
Q. And you were in the habit on such occasions of receipting to those who paid in the money of C. K. Holliday by yourself as his agent?

Objected to as incompetent, irrelevant, and immaterial.

A. Yes, sir
Q. When did you first speak to the defendant C. K. Holliday about the land in question?
A. I never spoke to him about it.
Q. Never at all?
A. I do not understand your question. You asked me when I ever spoke to him about the land. Oh, I suppose some time in the year 1886. I could not say when exactly; the fore part of the year, perhaps.
Q. Before the middle of June in that year?
A. Yes, sir; I think so.
Q. When, if ever, did you first speak to him about getting an interest in the land for yourself?
A. Well, I think that was some time during the month of July.
Q. Do you remember of sending a proposition relative to the purchase of the land to the complainant, Mr. Keith?
A. I do.
Q. Do you remember the first proposition that you sent to him relative to the purchase of the land?
A. I don't say that I could state. I don't remember.
Q. You don't remember just when it was?
A. I don't remember what the first proposition was?
Q. I do not ask you what it was. I ask you if you remember the fact of the first one during the summer of 1886?
A. Yes, sir.
533 Q. How long after you sent that proposition was it before you suggested to the defendant C. K. Holliday that you wanted an interest in the Keith land?
A. I think that it was about the time that I received the acceptance of the offer. I could not say when that was.

Q. Do you mean the answer of Mr. Keith to the first proposition that you made?

A. No; of his offer being accepted.

Q. If you sent the offer on June 30th, do you mean to say that the next letter after that which you received from Mr. Keith was an acceptance of the offer?

A. I do not know as I sent the offer on June 30th.

Q. Was the first answer which you received from Mr. Keith after you sent the first offer what you call in your testimony his acceptance of the offer?

A. I do not know.

Q. Did you get any other letters from him after you sent him the offer before you received what you call his acceptance?

A. I think I did.

Q. Did you write him again before you received what you call his acceptance?

A. I think I did.

Q. How long after you sent him the first offer before you indicated to the defendant C. K. Holliday that you desired an interest in the land?

A. I would say in the course of a week or ten days perhaps.

Q. A week or ten days?

A. Yes, sir.

Q. Will you look at the copy of your letter marked number one in your answer, and at the copy of letter which you say in your answer is the reply to your letter number one? Is this the letter which you call an acceptance of the offer?

534 A. No, sir; I think not.

Q. You think that is not the letter which you call his letter of acceptance?

A. No, sir; that is not what I call his letter of acceptance.

Q. Did you, before you communicated this letter dated July 7th to C. K. Holliday, state to him that you desired an interest in that land?

A. I think not.

Q. Are you sure that you did not?

A. To the best of my knowledge and belief I would say not.

Q. But you will not swear positively that you did not, will you?

A. I think I can say that I did not.

Q. Now, I will ask you if you will testify positively on your oath that you did not say to the defendant C. K. Holliday that you desired an interest in that land before you communicated to him the contents in the letter of M. C. Keith of July 7th. Will you swear that positively?

Yes, sir; I will swear that positively.

Q. How long after you received that letter of July 7th before you indicated such desire for an interest in the land to C. K. Holliday?

A. Not until we received his acceptance of the offer.

Q. Did you, before you received his acceptance of the offer, say to C. K. Holliday that you desired an interest in that land?

A. No, sir.

Q. How long after you first wrote to Mr. Keith before you received what you call his acceptance of the offer?

A. I should think it was in the course of a week; perhaps four or five or six days—somewhere along there.

Q. And you think within four or five or six days after
535 you sent the first offer of C. K. Holliday that you indicated to Mr. Holliday your desire for an interest in the land?

Objected to as incompetent, irrelevant, and immaterial and assuming a different state of facts than the witness has testified to.

A. No, sir.

Q. Then, how long after you sent the first offer until you indicated such desire to Mr. Holliday?

A. Well, it was not until after I received the acceptance of Mr. Keith of Col. Holliday's second offer.

Q. Did you then communicate the contents of that letter of Mr. Keith, which you call an acceptance, to Col. Holliday before you indicated to him that you desired an interest in the land?

A. Yes, sir.

Q. In days, how many was it after you sent the first proposition to M. C. Keith before you indicated to C. K. Holliday that you wanted an interest in the land?

A. I could not say.

Q. About how many?

A. Well, it might have been a week or two weeks. I could not say how many days it was, to the best of my recollection.

Q. You say you do not call this letter of July 7th the acceptance of the offer?

A. Well, under conditions it is an acceptance, I should think, from the way it reads.

Q. I am not asking you as to the meaning of the letter, but I am asking you what letter in your testimony you have called the acceptance of the offer; and I ask you now whether in your testimony you refer to this letter of July 7th as the acceptance of the offer.

A. Well, I don't know as I took that as a letter of accept-
536 ance—no, I don't think I would.

Q. Is that the letter which you refer to in your testimony as the acceptace?

A. No, sir.

Q. How many letters passed before you received what you call the acceptance of the offer?

A. I do not know.

Q. I will ask you again to state your best recollection of how long it was after you first wrote concerning an offer of purchase of this land to M. C. Keith before you intimated to C. K. Holliday that you desired an interest in the land—how many days after you sent such offer.

A. I could not answer that.

Q. About how many?

A. Well, ten or fifteen I would say.

Q. Did C. K. Holliday know of all the letters which you wrote to M. C. Keith during the progress of these negotiations or see them before you sent them?

A. I think he did.

Q. Do you think that he saw all of them before you sent them?

A. I think so—I think he did.

Q. How long after you sent your first proposition to M. C. Keith before you and C. K. Holliday had agreed that you should have an interest in the land?

A. Well, I can't say how long.

Q. Was it before you had ever received any deed from M. C. Keith?

A. Yes, sir; I think it was.

Q. Was it before you had sent a blank deed to M. C. Keith for execution?

A. I think it was.

Q. How long after you indicated to Col. Holliday that you
537 desired an interest in this land before he agreed that you should have it?

A. Well, two or three days.

Q. To whom did M. C. Keith send the deed for C. K. Holliday?

A. To myself.

Q. How long after you received it until you delivered it to C. K. Holliday?

A. I do not remember.

Q. When was the deed from C. K. Holliday to you written?

A. I think some time in September; the fore part of September.

Q. How long was it written and signed by C. K. Holliday before it was delivered to you?

A. That I do not remember.

Q. Had it been written and signed by him for several days before it was delivered to you?

A. It might have been.

Q. Was it not?

A. I could not say.

Q. Had he not so informed you that it was written and signed some days before it was delivered to you?

A. No, sir.

Q. And you do not know that it was written and signed at any time until he delivered it to you?

A. It must have been written and signed before he delivered it.

Q. Do you know that it was written and signed as much as one day before the delivery of that deed to you?

A. I think it must have been; yes, sir; it was one day.

Q. Do you think it was as much as two days?

A. It might have been.

Q. Do you think it was as much as three days?
538 A. I could not say.

Q. The time was indefinite?

A. I do not remember about it, really.

Q. Did C. K. Holliday deliver C. K. Holliday's deed to you at the same time that you delivered Mr. Keith's deed to C. K. Holliday?

A. I think he did.

Q. Did you take the deed which C. K. Holliday made to you and the deed which M. C. Keith made to C. K. Holliday and the mortgages made by C. K. Holliday to M. C. Keith to the office of the register of deed- all at one time?

A. No, sir.

Q. Did you take the deed made by M. C. Keith to C. K. Holliday and the deed made by C. K. Holliday to you to the office of the register of deeds at the same time?

A. No, sir.

Q. Did you take the deed made to you to the register's office?

A. Yes, sir.

Q. Who, if any one, took the deed made by Mr. Keith to Col. Holliday to the register's office?

A. Col. Holliday.

Q. Did you go to the register's office together?

A. No, sir.

Q. At that time what consideration had you paid or given to C. K. Holliday for his deed to you?

A. I had given nothing. The consideration was in the deed; only my obligation in the deed.

Q. Had you then executed him any notes?

A. No, sir.

Q. Had you then paid him any money?

A. No, sir.

539 Q. Your only obligation to him was in the deed to you?

A. Yes, sir.

Q. How long after that before you paid C. K. Holliday any money for this land?

A. I paid him in—I do not remember whether it was March or April last.

Q. How long after the delivery of the deeds before you gave him any notes or obligations?

A. I never gave him any notes.

Q. No notes or obligations whatever?

A. No, sir.

Q. Have you purchased any other land besides this in the city of Topeka or Shawnee county within the last two years?

A. No, sir.

Q. You never at any time let Mr. Keith know that you were to have any interest in this land until after the deeds were delivered to you, did you?

A. I think I did.

Q. When was the first conversation between you and C. K. Holliday relative to the purchase of this land?

A. I think some time during the month of June, 1886.

Q. Who first mentioned the matter of the land?

A. He mentioned to me about buying it.

Q. How long before the first proposition or offer was communicated to Mr. Keith?

A. Oh, I could not say; it might have been a week or two—some days.

Q. Did you see Mr. Keith at any time in the month of June, 1886?

A. No, sir.

Q. Did you see him at any time in the month of July, 1886?

A. No, sir.

540 Q. Did you see him at any time in the month of August, 1886?

A. No, sir.

Q. Did you see him at any time in the month of September, 1886?

A. Yes, sir.

Q. Where did you see him then?

A. I saw him in Omaha.

Q. Do you remember the substance of the conversation which you and Mr. Holliday had at the first time when you talked about the purchase of this land?

A. No, sir; I do not.

Q. You cannot state what it was?

A. No, sir.

Q. In your conversations with C. K. Holliday was there any agreement between you and him as to any commission that you should have?

A. No, sir.

Q. To whom did C. K. Holliday deliver the money which he paid for this land?

A. The first payment?

Q. Yes, sir.

A. To me.

Q. For Mr. Keith?

A. Yes, sir.

Q. To whom did he deliver the notes and mortgages which Mr. Holliday gave?

A. To me for Mr. Keith.

Q. Was the deed which C. K. Holliday made to you written on the day it bears date?

A. I could not say. I do not know.

Q. You do not know whether it was or was not?

A. I do not.

541 Cross-examination—questions by Mr. C. B. SMITH:

Q. Did you charge the complainant anything for your services in paying taxes on this land?

A. No, sir.

Q. Under what arrangement with Mr. Keith, if any, did you allow the pasturage on the land and collect the pasturage rent—the money?

A. By his permission.

Q. Well, what was the arrangement, if any?

A. Well, the arrangement was that after the south fence was put up there—the north fence was open and portions of both sides, east and west, and the arrangement was that if I would look after the land, etc., I could have whatever I could make out of it, or words to that effect, or something like that.

Q. Were you to finish the fences on the east and west sides and build one on the north side in consideration of your having the pasture?

A. Yes, sir.

Q. Was that the arrangement with Mr. Keith?

A. Yes, sir; partially. I had to do that to get anything out of it.

Q. Was it done by an understanding with him to that effect—with him?

A. Yes, sir.

Q. When was the fence on the north built by you?

A. I think it was some time in 1876?

Q. And when were the fences on the east and west repaired?

A. About the same time.

Q. Were these fences erected and repaired at your own personal expense?

A. Yes, sir.

542 Q. Did you ever obtain any money from Mr. Keith to pay for these improvements?

A. No, sir.

Q. It was in consideration of doing those things, was it, that you were to have the pasturage of the land?

A. Yes, sir.

Q. Before that time how had the land been—open to the public?

A. Yes, sir.

Q. Nobody was deriving any benefit from the pasturage excepting the people at large in Topeka?

A. No, sir.

Q. Look at the letter marked number 2 in red ink in your answer, a copy of which is set forth in your answer, which letter is dated July 13th, 1886, and state whether at that time, July 13th, 1886, you had suggested to Col. Holliday that you desired an interest in the land, or did you make any such statement to him prior to writing that letter?

A. No, sir.

Q. Had you informed Col. Holliday as to the contents of this letter before you made any such suggestion to him?

A. I do not know whether I had or not.

Q. Did Col. Holliday consent to let you have an interest in this land at the first time that you suggested it to him?

A. No, sir.

Q. How many times did you go to him with the suggestion that you might be allowed to have some interest in this land before he finally consented that you should have an interest?

A. Well, we had conversations in regard to it for a day or two—

two or three days before it was finally concluded to let me take an interest.

Q. When did you meet the complainant, Mr. Keith, in Omaha?

543 A. The fore part of September, 1886.

Q. Prior to the time of the letter set forth in your answer which is marked number 9 in red ink and dated the 20th of September, written by you to Mr. Keith?

A. Prior to that; yes, sir.

Q. To whom did the pronoun refer to when you used the following words in this letter of September 20th, 1886, being letter number 9—"We have not yet got it;" to whom did the word "we" refer to?

A. Myself and Col. Holliday.

Q. How long prior to September 20th, 1886, was it that you met Mr. Keith in Omaha?

A. I met him in Omaha, I think it was, on the 6th or 7th of September. That is as near as I can get at the date, I think.

Q. At the time or during the interview on the 6th or 7th of September, 1886, that you had in Omaha with the complainant Keith, did the complainant know of your interest in this property in controversy?

A. He did.

Q. How did he know it?

A. I told him.

Q. Prior to that time did he know who the purchaser of the property was?

A. Prior to September 6th or 7th?

Q. Yes.

A. Yes, sir.

Q. From whom had he obtained that information?

A. From myself.

Q. Did the complainant Keith make any objections to the business being closed up after he had ascertained that you had an interest in the property?

A. He did not.

Q. Did you voluntarily inform him at this time that you

544 were to have an undivided half interest with Col. Holliday in this property?

A. I did. I do not know that he knew how much of an interest; he knew that I was to have an interest.

Q. Did he make any objections of any kind?

A. He did not.

Q. Did he appear to be entirely satisfied with the transaction?

A. He did; yes, sir.

Q. Did you and the complainant separate at that time without any dispute of any kind or character?

A. We did; yes, sir.

Q. Have you seen him since?

A. No, sir.

Q. Has he ever communicated with you since?

A. He has not.

Q. At the time that you had the personal interview with the complainant in Omaha, which you state to be on the 6th or 7th of September, 1886, had his deed been delivered to Col. Holliday by you?

A. I could not say whether it had or not.

Q. I ask you whether it had or not.

A. Mr. Keith's?

Q. Yes, sir.

A. No, sir.

Q. Did you have any general conversation with Mr. Keith about this transaction at your interview in Omaha?

A. Yes, sir; somewhat.

Q. Did he express any satisfaction at having made the sale?

A. He did.

E. P. KELLAM.

545 The further taking of this testimony is here adjourned until Saturday, November 12th, 1887, at 2 o'clock p. m., at the same place.

LESTER S. WILSON, *Examiner.*

Parties met pursuant to adjournment.

Present: Complainant, by Mr. A. Bergen; defendants, — Mr. E. P. Kellam and Mr. C. B. Smith.

E. S. QUINTON, a witness on behalf of the complainant, being by me first carefully examined, cautioned, and solemnly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

Direct examination—questions by Mr. BERGEN:

Q. What is your name, age, place of residence, and occupation?

A. E. S. Quinton; residence, Topeka, Shawnee county, Kansas; age, 28 years; attorney-at-law.

Q. Are you acquainted with the complainant, Morrell C. Keith, and the defendants, E. P. Kellam and C. K. Holliday?

A. I am.

Q. Are you one of the attorneys for the complainant, Morrell C. Keith?

A. I am.

Q. Were you such on the 8th day of February, 1887?

A. I was.

Q. As such attorney for Morrell C. Keith did you have a conversation with Edward P. Kellam on that day?

A. Either on that day or a few days before. I think it was a few days before the 8th of February.

Q. What was that conversation?

Objected to as incompetent, irrelevant, and immaterial.

546 A. I went down to Mr. Kellam's and Mr. Holliday's office. I went to see both of the gentlemen, and I met Mr. Kellam

in his office. I stated to him that I represented Mr. Keith, and that I had come to see him about the Keith tract of land; that Mr. Keith was dissatisfied and believed that a fraud had been perpetrated upon him in the sale of it, and that he wanted the land restored to him. Mr. Kellam remarked that I would have to see Mr. Holliday, as he had bought from Mr. Holliday. I asked him then if Mr. Holliday was in, and he said no; that he was not in town, and whether I asked him if he would be back soon or not I don't remember, but he stated, either without my asking it or by my asking it, that they expected him back in a few days. I believe that was about all that was said.

E. S. QUINTON.

The complainants desire a continuation of the taking of the testimony in order to find a paper which appears to be temporarily lost, by which a certain date may be definitely fixed if found; and, defendants' attorney saying that he would not return from a contemplated absence until about the 20th instant, the further taking of this testimony is hereby adjourned for the purpose above mentioned until Monday, November 21st, 1887, at 11 o'clock a. m.

LESTER S. WILSON, *Examiner.*

Parties met pursuant to adjournment, and by agreement the further taking of testimony was adjourned until Monday, Nov. 28, 1887, at the office of Quinton & Quinton.

LESTER S. WILSON, *Examiner.*

547 The signature of the witnesses J. C. Wilson and E. L. Blood to their respective depositions *is* hereby waived by both parties hereto; and it is further agreed that their depositions shall have the same force and effect as if signed by the said witnesses.

LESTER S. WILSON, *Examiner.*

548 I, Lester S. Wilson, examiner duly appointed by the circuit court of the United States for the district of Kansas, do hereby certify that on the several days named in the depositions hereto annexed I was attended at the United States circuit court room, at Topeka, Kansas, by the counsel and witnesses aforesaid; that the said witnesses were duly sworn and examined, and that the depositions were reduced to writing and read by the witnesses respectively and by them respectively subscribed in my presence, except as otherwise agreed and shown in these depositions by stipulation of both parties hereto.

LESTER S. WILSON, *Examiner.*

Dated Nov. 22, 1887.

Examiner's fees -------	$100 00
Witness fees ----------	21
Marshal's " ----------	12 00
	$133 00

Paid by complainant.

[Endorsed:] No. 5934. Filed Nov. 22, 1887.

549 In the Circuit Court of the United States in and for the District of Kansas.

MORRELL C. KEITH, Complainant,
vs.
EDWARD P. KELLAM and CYRUS K. HOLLIDAY, Defendants.
} In Equity.

The separate answer of the defendant Cyrus K. Holliday to the bill of complaint exhibited against him and Edward P. Kellam by said Morrell C. Keith, complainant.

This defendant, now and at all times hereafter saving and reserving all manner of advantage to himself of exception to the many errors and insufficiencies in said bill contained, for answer thereunto or unto so much thereof as this defendant is advised is material for him to make answer thereto answers and says—

That he admits that on the 19th day of August, 1886, the said complainant, Morrell C. Keith, was the owner of the lands and tenements described in said bill and had been the owner thereof for more than five years previous thereto.

And this defendant, further answering, says that as to the charge that the said defendant, Edward P. Kellam, was during all that time or at any time the general agent of said complainant, for reasonable compensation, to care for said land, to pay the taxes thereon, and to sell the same he has no positive knowledge, but he is informed and believes and therefore alleges upon his informa-

550 tion and belief that the said Edward P. Kellam was not at any time the general agent of said complainant or in any sense of the term an agent of said complainant to sell said land. This defendant is informed and believes and therefore upon such information and belief alleges that the said Edward P. Kellam was not at any time the agent of said complainant to sell said land, or his agent for any compensation whatever to care for said land, or his agent for compensation to pay the taxes thereon; but on such information and belief avers and alleges that said Kellam paid the taxes on said land and cared for the same without any compensation therefor, without any agreement between him, the said Kellam, and said complainant that he, said Kellam, should or would receive any compensation therefor, and without any expectation or intention on the part of said Kellam that he would receive any compensation for anything that he had done or was doing for said complainant in regard to said land.

And defendant, further answering, says that he admits the residence of complainant and of said defendant, Kellam, to be as stated in said bill of complaint; that he cannot state positively that said defendant, Kellam, well knew the value of said land, but he admits that he believes that said Kellam was a fair judge of the value of land in the vicinity of said city of Topeka.

And defendant, further answering, denies that said land was on the said 19th day of August, 1886, of the value of $100,000.00, and denies that said land could then have been sold for said sum.

This defendant denies that he then knew or believed that said land could be sold for said sum, but, on the contrary, alleges that he, said answering defendant, is a fair and reasonably good judge of the value of land in the vicinity of said city of Topeka, and that he then and now believes that said land could not then have
551 been sold for said sum, and *fimely* believed at the time and now believes that said land could not have been sold at the time he made the purchase thereof from said complainant for a sum greater or materially greater than the sum of $60,000.00.

This defendant, further answering, says that he does not know positively whether said complainant was ignorant in reference to the value of said land, but he believes that, owning said land as he did and its value being so great, he, the said complainant, had kept himself well informed as to its value and was not ignorant thereof.

And this defendant, further answering, says that he denies positively all conspiracy in said bill charged, and alleges that this defendant and said Edward P. Kellam did not at any time conspire together to fraudulently purchase the said land from said complainant either at a price less than its value or any price, and alleges that this defendant and said Edward P. Kellam did not agree that said Kellam, as the agent of said Keith, the complainant, should represent to said complainant that said land was worth no more than $60,000, and did not (before the offer of this defendant to purchase said land for the sum of $60,000.00, as hereinafter stated, was accepted) agree that this defendant and said Kellam should jointly pay for said land, and that an undivided one-half thereof should be conveyed by this defendant to said Kellam; and this defendant denies that pursuant to any such agreement or any agreement or any direction or authorization of this defendant (except as hereinafter stated) said Kellam, as the agent of said complainant, or being, with the knowledge of this defendant, the agent of said complainant to sell said land, wrote to said complainant that this defendant offered to pay said sum of $60,000.00 for said land, and that
552 the same was worth no more than $60,000.00.

And this defendant, further answering, admits that the said complainant did accept the offer of this defendant (made as hereinafter stated) to pay said complainant $60,000.00 for said land, and did on said 19th day of August, 1886, make his deed conveying said land to this defendant and transmitted the same to —— ——, Topeka, to be delivered to this defendant upon the payment and securing the consideration therefor.

And this defendant, further answering, denies that upon the transmittal of said deed to —— ——, Topeka, the said Edward P. Kellam and this defendant jointly and in equal shares, or jointly and in any proportion whatever, paid the portion of cash which was to be paid upon the delivery of said deed to said Cyrus K. Holliday; but he alleges, on the contrary, that said Kellam did not pay any part of that portion, but that the whole of that portion was paid by this defendant, and that the said Kellam did not pay or repay to this defendant any portion of said money until on or about the 30th day of March, 1887, after the commencement of this action.

This defendant admits that he executed a deed to said Kellam of an undivided half of said land, as alleged in said bill, but he alleges that said deed, although dated Sept., 1886, was not really executed and delivered until about the 19th day of September, 1886.

And this defendant, further answering, denies that said complainant has ever offered to restore and return to this defendant all things or anything which he, said complainant, had received from him for said land, or that he, said complainant, ever requested him to reconvey said land to said complainant; and this defendant
553 is informed and verily believes that no such offer or request to said Edward P. Kellam has ever been made by said complainant, and this defendant says that he was never informed, either directly or indirectly, by the complainant or by any one and never had cause or reason to believe that said complainant was not satisfied with his said sale or desired to rescind the same until after the commencement of this action.

And this defendant, further answering, says that the real facts in the case and the true history of the whole transaction referred to in said bill of complaint and made the basis thereof are as follows:

That this defendant, being for many years largely interested in the prosperity of the city of Topeka and having devoted much time and careful consideration as to its future prospects and condition, came to the conclusion that in view of numerous projected enterprises connected with said city, the probable advent of proposed railroads and other causes, it was highly probable that the prices of real estate in and near said city would be enhanced, and that sooner or later such appreciation in values would exist as to make investments in real estate in and near said city safe and even profitable. Being of this opinion, in June, 1886, although not anticipating the advance in price which has been reached within the last six months and not knowing the post-office address of said complainant and understanding that said defendant, Edward P. Kellam, was paying the taxes on the land described in said bill and was in correspondence with said complainant, this defendant authorized said Kellam to write to said complainant that he, this defendant, would give him (the complainant) $40,000.00 for the south half of said land or
554 $60,000.00 for all of it. No agreement was made that said Kellam was to be interested in the proposed purchase, and no suggestion made or offered on the part of either to that effect. This was in June, 1886, and, to the best of this defendant's remembrance, soon after the middle of the month, early in July, said Kellam notified this defendant that the complainant had accepted this defendant's offer and had written to him as follows: "I accept that man's offer." This was on or soon after the ninth day of July, 1886. About the middle of that month this defendant authorized said Kellam to propose to said complainant that he, this defendant, would pay the sum of $10,000.00 in cash on said purchase and $10,000.00 every six months thereafter until the whole sum of $60,000.00, with the interest, should be paid, or that this defendant would pay $20,000.00 in cash and $20,000.00 each year thereafter until said $60,000.00 should be paid, with interest.

About the first of August this defendant was notified by said Kellam that he had received an answer to said last proposal from complainant that he, the said complainant, "would take $25,000.00 down and balance to suit you." By that time this defendant had, at the request of said Kellam and not till after several suggestions from Kellam to that effect, agreed to allow Kellam to become the owner of half said land by paying half the purchase-money therefor if the trade should be consummated, but this defendant says that said agreement was not made until after the 15th of July, 1886, and, from the best remembrance of this defendant, not til- after Aug. 1, 1886. After some deliberation this defendant concluded to accede to the terms of complainant's last proposal, and about the 9th of August went to Boston, Mass., to obtain the money, and
555 returned about the 30th day of August, 1886, and about the 20th of September, 1886, soon after, paid said sum of $25,000.00 and closed the transaction by executing his two promissory notes to said complainant for the sum of $17,500.00 each, due in one and two years respectively, with interest, and executing to said complainant a mortgage to secure the payment of said promissory notes.

And this defendant, further answering, denies that the said complainant is entitled to the relief or any part thereof in his said bill of complaint demanded; without this, that any other matter or thing material for him to make answer to or not herein sufficiently answered, avoided, or denied is true to the knowledge, information, or belief of this defendant; all which matters and things this defendant is ready to aver and prove as this court shall direct, and prays to be hence dismissed with his reasonable costs and charges in this behalf most wrongfully sustained.

ROSSINGTON, SMITH & DALLAS,
Sol's for said Def't.

JOHN T. HORTON,
Of Counsel.

UNITED STATES OF AMERICA, } ss:
District of Kansas, }

Cyrus K. Holliday, being duly sworn, deposes and says that he is one of the defendants in the suit described and entitled in the foregoing answer, and is the defendant who makes said answer; that he has heard said answer read and knows the contents thereof; that all the statements and allegations contained in said answer as stated to be of his own knowledge are true, and that so far as
555½ the same are stated on information and belief he believes them to be true.

C. K. HOLLIDAY.

Subscribed and sworn to before me this 31st day of March, 1887.
J. C. WILSON,
U. S. Circuit Court Commissioner, District of Kansas.

Endorsed: No. 5934. Morrell C. Keith *vs.* Edward P. Kellam *et al.* Answer of def't C. K. Holliday. Filed April 4, 1887. A. S. Thomas,

clerk, by Frank J. Thomas, deputy. Filed June 6, 1887. A. S. Thomas, clerk.

556 In the Circuit Court of the United States for the District of Kansas.

MORRELL C. KEITH, Complainant,
vs.
EDWARD P. KELLAM and CYRUS K. HOLLIDAY, Defendant-. } In Equity.

The separate answer of the defendant Edward P. Kellam to the bill of complaint exhibited against him and Cyrus K. Holliday by said Morrell C. Keith, complainant.

This defendant, now and at all times hereafter saving and reserving all manner of advantage to himself of exception to the many errors and insufficiencies in said bill contained, for answer thereunto or unto so much thereof as this defendant is advised is material for him to make answer thereto answers and says—

That he admits that on the 19th day of August, 1886, the said complainant, Morrell C. Keith, was the owner of the lands and tenements in said bill described and had been the owner thereof for more than twenty-eight years previous thereto.

And this defendant, further answering, says that as to the charge that this defendant was during all that time or at any time the general agent of said complainant for reasonable compensation or for any compensation to care for said lands, to pay the taxes thereon, and to sell the same this defendant denies the same and alleges that he, this defendant, was not at any time the general agent of said complainant or in any sense of the term an agent of said complainant to sell said land or to lease and collect the rents for said land, except that in the fall of 1885 said complainant said that said land ought to rent for something, and on the strength of that this defendant agreed with a base-ball club at Topeka to let them use about four acres of said land for the purpose of playing ball. This
557 defendant denies such agency and alleges that he was not at any time the agent of said complainant for any compensation whatever to care for said land, or his agent for compensation to pay the taxes thereon; but this defendant says that he, this defendant, attended to the payment of the taxes on said land and cared for said land without any compensation therefor, without any agreement between this defendant and said complainant that he, this defendant, should or would receive any compensation therefor, and without any expectation or intention on the part of this defendant that he, this defendant, would receive any compensation for anything that he had done or was doing for said complainant in regard to said land; and this defendant says that he, this defendant, never received any money or thing whatever or any benefit whatever for anything that he did in connection with said land, except under the following circumstances: About the year 1876 this defendant advised complainant to have the south line of said land fenced to prevent tres-

passing thereon. Complainant furnished this defendant money to pay therefor, which this defendant used for that purpose, but neither received or charged anything for his services in this matter or for attending to the payment of taxes on the land. In 1877 or 1878 or 1879, when defendant was at North Platte, in the State of Nebraska, the complainant told this defendant that if he, this defendant, would fence up that line of the land which was open he, this defendant, might make all that he could off of the land. To this proposal this defendant agreed, and at his own expense fenced the same and has kept up the fence thereon, receiving some rent for pasturage thereon, and using the same to some extent for pasturing his own cattle thereon. Neither the expense of making said fence or of keeping the same in repair has been repaid by or charged to said complainant. This is all the benefit this defendant has ever derived
558 from what he has done in reference to said land.

Defendant admits the residence of the parties as charged in said bill, but avers that said complainant was all the time well acquainted with the value of said land, and denies positively that he, this defendant, ever informed said complainant of the value of said land or as to what he, this defendant, believed to be the value thereof.

And this defendant alleges that said land was not on the said 19th day of August, 1886, of the value of one hundred thousand dollars; that he, this defendant, had never been offered for said land any greater sum than sixty thousand dollars, and denies that said land could then have been sold for one hundred thousand dollars. This defendant believes and therefore alleges that said land could not then have been sold for more than the sum of sixty thousand dollars. This defendant admits that he believes that he was at that time well acquainted with the value of said land.

And this defendant, further answering, says that he positively denies all conspiracy in said bill charged, and avers that this defendant and said Cyrus K. Holliday never at any time entered into a conspiracy to fraudulently obtain the title to said land for themselves from said complainant at any price less than its real value. This defendant avers that he did not previously inform said complainant that said land was not worth more than sixty thousand dollars, and that it was not agreed between said defendants that this defendant should not inform said complainant that said land was worth more than sixty thousand dollars, and avers that previous to the time when the offer hereinafter mentioned by said defendant Cyrus K. Holliday was made by said Holliday and sent by this defendant to complainant—that is to say, the proposition of said Holliday to purchase the land—no agreement, arrangement,
559 or understanding whatever existed between this defendant and said Holliday that this defendant should in any way become the owner of an undivided one-half of said land or of any interest whatever in said land.

This defendant admits that he, this defendant, did "enter into correspondence" with the said complainant "relative to the sale of said land," but alleges that said correspondence was not "in pursu-

ance of any fraudulent conspiracy," and avers that it was begun by the request of said Holliday and to communicate to said complainant the offer of said Holliday. Copies of the letters written by this defendant to complainant—being all the letters in reference to said sale written by this defendant to said complainant, to the best of this defendant's memory, being copied from the sworn copies of the same furnished this defendant by complainant—are hereinafter given in full and numbered respectively No-. 1, 2, 3, 4, 5, 6, 7, 8, and 9.

Defendant admits that in said letters he did not communicate to complainant any facts which tended in any way to show the value of the land for the reason that he was not in any sense of the term an agent for the complainant to sell said land or to negotiate the sale thereof; that complainant had not in any way indicated to this defendant that he desired any information upon the subject or any opinion of this defendant as to the value of the land, and because, as this defendant avers, he fully believed that the complainant was fully informed as to the value of said land.

This defendant admits that said complainant executed a deed to said defendant Holliday conveying said land to said Holliday, and transmitted the same to this defendant to be delivered to said Holliday; that said Holliday paid to said complainant through this defendant the sum of $25,000 in cash and secured the pay-
560 ment of the balance of the purchase-money by executing two promissory notes, each for the sum of $17,500.00, one due on or before one year after date and the other due on or before two years after date, both dated August 19th, 1886, bearing six per cent. per annum interest, and two mortgages of said land, of the same date, each securing one of said notes. Said money, notes, and mortgages were transmitted to said complainant through this defendant, who in this matter only acted as the voluntary, friendly, and uncompensated agent of said complainant as well as of said Holliday for the purpose of such transmittal only and at the request of complainant, as apparent from and in compliance with the correspondence between complainant and this defendant hereinafter set forth and copied in full.

And this defendant, further answering, admits that in the month of September, 1886, the said Cyrus K. Holliday executed to this defendant a deed of conveyance for one undivided half of said land, but this defendant avers that said deed was not executed in pursuance of any agreement between said defendant Holliday and this defendant by which "said complainant had been induced by" this defendant "to sell said land or to agree to sell the same;" and this defendant positively avers that neither by any representations, direct or indirect, made by this defendant as to the value of said land or by any other representations or manner or means whatever made or used by this defendant was the said complainant induced to sell said land or to agree to sell the same. This defendant avers that said deed from said Holliday to this defendant, although dated September 1, 1886, was not really executed until the 19th day of September, 1886, and that the consideration of said deed

was the sum of twelve thousand five hundred dollars ($12,500.00) and the assumption of the one-half of the thirty-five thousand dollars still due and owing for said land. Some time after
561 the execution of said deed this defendant paid to said Cyrus K. Holliday as the money part of the consideration thereof the said sum of twelve thousand five hundred dollars, with interest thereon at the rate of eight per cent. per annum from the time that said Holliday made his first payment to said complainant.

And this defendant, further answering, denies that the said complainant on the 8th day of February or at any other time ever offered to this defendant to return or restore to these defendants all things received from them for said land or to return or restore anything received from them or from either of them, and alleges that he, the said complainant, never in any way expressed his desire to either of these defendants that they should reconvey said land to said complainant. This defendant avers that he, this defendant, never refused any such offer and had no opportunity to refuse it, as no such offer ever was made, and this defendant never said that he "would have to see said Cyrus K. Holliday." This defendant, on the contrary, positively alleges that he, this defendant, was never informed, directly or indirectly, by the complainant or by any one or had any cause or reason to believe that said complainant was not satisfied with his said sale, or that he desired to rescind the same until after the commencement of this action, and then only by the service of summons upon him after the commencement of this action.

And this defendant, further answering, says that the real facts in the case and the true history of the whole transaction referred to in said bill of complaint are as follows:

About the 29th day of June, 1886, the said defendant, Cyrus K. Holliday, authorized and requested this defendant to write to said complainant that he (said Holliday) would give said complainant forty thousand dollars for the south forty acres of said land or sixty thousand dollars for all of it. No agreement and no
562 suggestion of any kind was made that this defendant was to be in any way interested in the proposed purchase on the part of either this defendant or said Holliday, and this defendant had never been authorized or requested by said complainant to sell said land, to negotiate for its sale, or to do anything whatever towards effecting a sale or finding a purchaser for said land. Solely in consequence of this request of said Holliday this defendant, on the 30th day of June, 1886, wrote and mailed to said complainant a letter, of which the following is a true copy:

No. 1.

"TOPEKA, KAS., *June 30th*, 1886.

"DEAR MORRELL: A gentleman here wishes me to ask you if you will take a thousand dollars an acre for the south forty of your tract, or sixty thousand dollars for the whole. He wishes an early reply.

"Truly yours, E. P. KELLAM.

"All well."

In reply to this this defendant received on the 9th day of July, 1886, a letter from the complainant, in the handwriting of said complainant, of which the following is a full and perfect copy:

"JULY 7, 188–.

"FRIEND KELLAM: I will take that man's offer if he takes it within a few days. I would rather you would have it.

"Yours truly, M. C. KEITH."

On the 13th day of July, 1886, at the request of said Holliday, this defendant again wrote to complainant a letter, of which the following is a full and perfect copy:

563 No. 2.

"TOPEKA, KANSAS, *July 13th*, 1886.

"DEAR MORRELL: Yours to hand in due time but I could not answer sooner. If you are still inclined to take his offer for the land, he would like to know how much you require down and the time and rate of interest on the deferred payments. I think there is no doubt but that he will take it, if terms are satisfactory.

"Very truly yours, E. P. KELLAM.

"Weather hot and dry."

To this letter this defendant on the 24th day of July, 1886, received an answer, being in the handwriting of the said complainant, but without any signature, which answer—a written letter—was in words and figures as follows:

"NORTH PLATTE, *July* 30.

"FRIEND ED: I don't think I want to sell on time but tell him to make me a proposition and I will tell him what I will do."

This defendant immediately notified said Holliday of the receipt of this letter, informed him of the contents, and showed him the letter.

On the 27th day of July, 1886, at the request of said Holliday, this defendant wrote to complainant that said Holliday would pay for the land as follows, viz: In cash, $10,000; the remaining $50,000.00 to be paid in half-yearly payments, each $10,000.00, with interest at six per cent. per annum; or would pay twenty thousand dollars cash down, twenty thousand dollars in one year, and twenty thousand dollars in two years, with interest at six per cent. per annum, with the privilege of paying more or all of the purchase-money at any time and have corresponding portions of the land released; the back payments to be secured by mortgage on the land. This defendant only retained a copy of the concluding portion of this letter, and there is no copy of it included among the
564 copies furnished as aforesaid to this defendant by order of the court, but said letter concluded as follows:

"If you accept either of the above offers, I will see to making out all necessary papers &c. Let me hear from you soon.

"Yours truly, E. P. KELLAM."

To this letter this defendant received on the 31st day of July, 1886, an answer from the said complainant, being a letter in the handwriting of the said complainant, of which the following is a full and complete copy:

"JULY 29.

"DEAR ED: I will take twenty-five thousand down the balance to suit you.

"Yours truly, M. C. KEITH."

Upon the receipt of the letter of July 7, 1886, copied above, this defendant had notified said Holliday that his offer was accepted and had shown him the letter. About the 3d day of August, 1886, the said Cyrus K. Holliday notified this defendant that he accepted the terms contained in the said letter of complainant of date July 29, and on the 4th day of August, 1886, this defendant wrote and mailed to said complainant a letter, of which the following is *is* a true and complete copy:

No. 3.

"TOPEKA, *Aug.* 4, '86.

"DEAR MORRELL: I think sale will go through as per yours of the 29th ult., making first payment of twenty-five thousand dollars. You will hear from me again in a few days.

"Truly yours, E. P. KELLAM."

565 Upon the same day, August 4th, 1886, this defendant wrote and mailed to the complainant a letter, of which the following is a true and complete copy:

No. 4.

"TOPEKA, *Aug.* 4,

"DEAR MORRELL: I forgot to ask you in my letter to-day to send me abstract of title to land, if you have one as it would save the cost of getting another. If there have been any matters of record since the date of same they can be added to it. I am satisfied that the sale will go through.

"Truly yours, E. P. KELLAM."

On the 11th day of August, 1886, this defendant wrote and mailed to complainant a letter, of which the following is a true and complete copy:

No. 5.

"AUG. 11, 1886.

"Enclosed you will find deed made out ready for your signature. When signed and duly acknowledged, please return it to me to be

delivered by me to the party upon the payment of twenty-five thousand dollars and the notes for the balance and mortgage. The balance will consist of two notes of seventeen thousand five hundred dollars each making $35000 and bearing interest at the rate of 6 % per annum payable in one and two years and secured by mortgages on the land. Before I deliver the deed will send the notes and mortgages to you for your approval, and if all satisfactory you will return the mortgage to be recorded and I will forward you a New York draft for the twenty-five thousand dollars. Not having heard from you in regard to the abstract of title will look it up at once.

"Very truly yours, E. P. KELLAM."

"P. S. Please sign with full name same as in deed and fill date blanks.

"K."

566 To the letter last above copied this defendant, on the 20th day of August, received an answer in the handwriting of said complainant, of which the following is a true and exact copy:

"NORTH PLATTE, —— 18.

"DEAR ED: I was away when your letter came but will send deed to-day You have mortgage fixt and put on record.

"Yours truly, M. C. KEITH."

On the 21st day of August, 1886, this defendant received from said complainant the deed signed and acknowledged by said complainant, conveying said land to said Cyrus K. Holliday. This was the same deed enclosed in the letter of date Aug. 11, 1886, above copied, written and mailed by this defendant to the complainant. On the 21st day of August, 1886, this defendant wrote and mailed to said complainant a letter, of which the following is a true and exact copy:

No. 6.

"TOPEKA, KAS., *Aug.* 21.

"DEAR MORRELL: Yours to hand. Col. Holliday is in Boston. Will return first of the week when I will make out mortgage &c and have it recorded and forward to you.

"Yours truly, E. P. KELLAM."

On the 30th day of August, 1886, the said defendant, Cyrus K. Holliday, paid to this defendant, to be transmitted to said complainant as his first payment to said complainant on said purchase, the sum of twenty-five thousand dollars, which sum of twenty-five thousand dollars this defendant immediately transmitted to said complainant enclosed in a letter, of which the following is a true and complete copy:

No. 7.

"TOPEKA, KAS., *Aug.* 30, 1886.

"DEAR MORRELL: Enclosed find draft for twenty-five thou-
567 sand dollars to Nat. Park Bank N. Y. No. 46,248 as per my telegraph of this date. The balance of the papers will follow in a day or two.

"Very truly yours, E. P. KELLAM."

On the same day, August 30, 1886, this defendant sent to said complainant a telegram, of which the following is a copy:

No. 8.

"TOPEKA, KAS., *Aug.* 30, 1886.

"To M. C. Keith North Platte Nebr.

"I send you draft to-day for twenty-five thousand.

"E. P. KELLAM."

On the 18th day of September, 1886, this defendant received from the said complainant a telegram, of which the following is a copy:

"SEPY 18, 1886.

"To E. P. Kellam.

"Is mortgage executed for record Why dont you send?

"M. C. KEITH."

On or about the 20th day of September, 1886, the said defendant Holliday delivered to this defendant his two promissory notes for the sum of $17,500.00 each, payable to said complainant, one due on or before one year after date and one due on or before two years after date, with two mortgages upon said land to secure the payment of said notes, said notes and mortgages being dated August 19, 1886, and being the same notes and mortgages referred to in the said complainant's bill of complaint. Upon the receipt from said Holliday of said notes and mortgages this defendant immediately transmitted the said notes and mortgages to the said complainant enclosed in a letter, of which the following is a true and exact copy:

No. 9.

"TOPEKA, KAS., *Sept.* 20, '86.

568 "DEAR MORRELL: Enclosed find *find* notes and mortgages due in one and two years from date. The reason I did not send them before was because we were anxious to get the release from Boshman before I put them on record. We have not yet got it, though I have written him twice and sent funds to pay the expense &c but have not received any word from him. But to accommodate you in your Omaha deal will send to-day—although our attorneys say that the title is not clean without the release, or a decree from the court.

"Truly yours, E. P. KELLAM."

And this defendant avers that the correspondence embodied and set out in the letters and telegrams copied above constituted, to the best of this defendant's memory, all the correspondence between this defendant and said complainant in reference to said sale of said land to said defendant Holliday, and that no verbal interview or conversation in reference to said sale ever took place between this defendant and said complainant.

And this defendant, further answering, denies positively that he was ever the agent of said complainant for the purpose of selling said land, for informing him, said complainant, of the value thereof, or to procure or find a purchaser therefor.

until after said sale was concluded.

And this defendant says that at the time said Holliday requested this defendant to transmit to said complainant his, the said Holliday's' offer to purchase said land, as above stated, he, this defendant, was simply acting as the agent of said Holliday, as he had a perfect right to do, and that at that time he, this defendant, had no intention, expectation, or thought of becoming interested in any way in the proposed purchase of said land from said complainant, but that after he, this defendant, had transmitted the offers of
569 said Holliday to said complainant, and not till then, he, this defendant, suggested to said Holliday that he would like to join with him in the purchase of said land. It was not until after several suggestions to this effect were made by this defendant to said Holliday that he agreed to them and consented to this defendant's becoming interested in said purchase; but some time between the 15th day of July, 1886, and the 2d day of August, 1886, the said Holliday agreed that if this defendant would pay half the money to purchase said land he might have a half interest therein.

In pursuance of this agreement this defendant took from said Holliday a deed of conveyance for an undivided one-half of said land, paid to said Holliday the sum of twelve thousand five hundred dollars, with interest thereon at the rate of eight per cent. per annum from August 30, 1886, and assumed the payment of half of the thirty-five thousand dollars still due and owing for said land and for which said Holliday was liable upon his notes and mortgages, as above stated and as stated in complainant's bill of complaint.

And this defendant, further answering, denies that the said complainant is entitled to the relief or any part thereof in his said bill of complaint demanded; without this, that any other matter or thing material for him to make answer to and not herein sufficiently answered, avoided, or denied is true to the knowledge, information, or belief of this defendant; all which matters and things this defendant is ready to aver and prove as this court shall direct, and prays to be hence dismissed with his reasonable costs and charges in this behalf most wrongfully sustained.

ROSSINGTON, SMITH & DALLAS,
Solicitors for said Defendant.

JOHN T. MORTON, *Of Counsel.*

570 THE UNITED STATES OF AMERICA, *District of Kansas,* } ss:

Edward P. Kellam, being duly sworn, deposes and says that he is one of the defendants in the suit described and entitled in the foregoing answer and is the defendant who makes said answer; that he has read said answer and knows the contents thereof; that all the statements and allegations contained in said answer as stated to be of his own knowledge are true, and that so far as the same are stated to be on information and belief he believes them to be true.

E. P. KELLAM.

Subscribed and sworn to before me this 20th day of June, 1887.

J. C. WILSON.
U. S. Cir. C't Com's'r, Dist. of Kansas.

Endorsed: No. 5934. Morrell C. Keith *vs.* Edward P. Kellam *et al.* Answer of def't Edward P. Kellam. Filed June 6, 1887. A. S. Thomas, clerk.

571 MORRELL C. KEITH
vs.
EDWARD P. KELLAM and CYRUS K. HOLLIDAY. } In Equity.

Now comes the said Morrell C. Keith, by A. Bergen, his solicitor, and the said defendants, by John T. Morton, their solicitor, and on motion of said defendants it is ordered that the said defendant, Edward P. Kellam, have leave to verify his answer heretofore filed by affidavit to its truth, such verification to have only the same effect as if made at the time of filing.

Clerk enter.

C. G. FOSTER, *Judge.*

Endorsed: No. 5934. Morrell C. Keith *vs.* Edward P. Kellam *et al.* Order. Filed June 16, 1887. A. S. Thomas, clerk, by Frank H. Holt, deputy.

572 In the Circuit Court of the United States for the District of Kansas.

MORRELL C. KEITH, Complainant,
vs.
EDWARD P. KELLAM & CYRUS K. HOLLIDAY, Defendants. }

Replication of Morrell C. Keith, Complainant, to the Answer of Cyrus K. Holliday, Defendant.

This repliant, saving and reserving unto himself now and at all times hereafter all and all manner of benefit and advantage of exception which may be had or taken to the manifold insufficiencies of said answer, for replication thereunto says that he will aver, maintain, and prove his said bill of complaint to be true, certain, and sufficient in law to be answered unto, and that the said answer

of said defendant is uncertain, untrue, and insufficient to be replied unto by this repliant; without this, that any other matter or thing whatsoever in said answer contained material or effectual in the law to be replied unto and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true; all which matters and things this repliant is and will be ready to aver, maintain, and prove as this honorable court may direct, and humbly prays as in and by his said bill he has already prayed.

QUINTON & QUINTON,
Complainant's Solicitor-.

A. BERGEN, *Of Counsel.*

Endorsed: No. 5934. Morrell C. Keith, complainant, *vs.* Edward P. Kellam *et al.*, defendants. Replication to answer of C. K. Holliday. Filed July 5, 1887. A. S. Thomas, clerk, by Frank H. Holt, deputy.

573 In the Circuit Court of the United States for the District of Kansas.

MORRELL C. KEITH, Complainant,
vs.
EDWARD P. KELLAM & CYRUS K. HOLLIDAY, Defendants.

Replication of Morrell C. Keith, Complainant, to the Answer of Edward P. Kellam, Defendant.

This repliant, saving and reserving unto himself now and at all times hereafter all and all manner of benefit and advantage of exception which may be had or taken to the manifold insufficiencies of said answer, for replication thereunto says that he will aver, maintain, and prove his said bill of complaint to be true, certain, and sufficient in law to be answered unto, and that the said answer of said defendant is uncertain, untrue, and insufficient to be replied unto by this repliant; without this, that any other matter or thing whatsoever in said answer contained material or effectual in the law to be replied unto and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true; all which matters and things this repliant is and will be ready to aver, maintain, and prove as this honorable court may direct, and humbly prays as in and by his said bill he has already prayed.

QUINTON & QUINTON,
Complainant's Solicitor-.

A. BERGEN, *Of Counsel.*

Endorsed: No. 5934. Morrell C. Keith, complainant, *vs.* Edward P. Kellam *et al.*, defendants. Replication to answer of Edward P. Kellam. Filed July 5, 1887. A. S. Thomas, clerk, by Frank H. Holt, deputy.

574 At a circuit court of the United States for the district of Kansas held at the court-house, in the city of Leavenworth, on the 4th day of June, 188–.

Present: The Honorable David J. Brewer, circuit judge.

MORRELL C. KEITH, Plaintiff,
vs.
EDWARD P. KELLAM and CYRUS K. HOLLIDAY, Defendants.

This cause came on to be heard upon the pleadings, proofs, and exhibits and was argued by counsel; and thereupon it was ordered, adjudged, and decreed as follows:

First. That the contract for the sale of the premises in the said bill and hereinafter described, between the plaintiff and defendants, made on the 19th day of August, 1886, was by reason of the matters in the said bill complained of fraudulent and void, and that the deed made by the said plaintiff to the defendant Cyrus K. Holliday, bearing date on said day and recorded in the office of the register of deeds of Shawnee county, in the State of Kansas, at page 335 of Book 125, whereby the said plaintiff conveyed the said premises to the said Holiday, and also the deed made by the said Cyrus K. Holliday to the said Edward P. Kellam, bearing date on the 1st of September, 1886, and recorded in the office of the register of deeds of said county, at page 336 of Book 125, whereby the said Holliday conveyed to the said Kellam the undivided one-half of the said premises, and the said defendants obtained the deed first aforementioned from the said plaintiff in pursuance of the said contract, and the said two deeds were fraudulent and void and ought to be delivered up to be cancelled.

575 Second. That the said plaintiff bring into this court and deposit with the clerk thereof within thirty days from the date of this decree the two promissory notes made to him by the said Holliday, bearing date on the day first aforesaid, each calling for $17,500.00, with interest at six per cent. per annum, one falling due one year after date and the other falling due two years after its date, and also the two several mortgages upon the premises above referred to, made by the said Holliday to the said plaintiff, mortgaging said premises, each to secure one of the said notes, and also the sum of $25,000.00, with interest thereon at seven per cent. per annum from the 30th of August, 1886, to the date of the said deposit; and the said plaintiff now deposits and has deposited with the clerk of this court said money, amounting to the sum of $28,135.50, and said notes, mortgages, and releases of said mortgages.

Third. Within thirty days from the date of this decree the said defendants, Cyrus K. Holliday and Edward P. Kellam, bring into and deposit in the office of the clerk of this court a deed of conveyance conveying the said premises and all thereof from them to the said plaintiff with covenants of warranty against their own acts since the making of the deed hereinbefore mentioned by the plaintiff to the said Holliday, and, upon deposit of the said deed in the office of the clerk of the said court, the said clerk deliver to the said defendants the said mortgages and notes and money herein-

before mentioned and which the said plaintiff has deposited with the said clerk.

Fourth. That the several deeds of conveyance and mortgages and notes and contract in the said bill mentioned be by the party holding the same delivered up to be cancelled, and that each and every thereof is and shall henceforth be held to be null and void.

Fifth. If the said defendants or either of them fail to make
576 the deed of conveyance to the said plaintiff conveying the said premises to him, as hereinbefore required, within the time in that behalf limited, then and in that case Hiram P. Dillon, one of the masters of this court, shal- make and execute a deed in behalf of the said defendants conveying the said premises to the said plaintiff, which deed shall be taken to be and operate as the conveyance of the said defendants and each of them.

Sixth. That the plaintiff have and recover by and from said defendants the costs of this suit, to be taxed by the clerk. The premises hereinbefore referred to described in the bill of complaint and the deed hereinbefore mentioned from the plaintiff to the defendant Holliday are known and described as follows: The east half of the southeast quarter of section twenty-five (25), in township eleven (11) south, of range fifteen (15) east, of the sixth principal meridian, and also a part of the east half of the northeast quarter of the same section, described as follows: Commencing at the southeast corner of the said northeast quarter and running thence north thirteen rods, thence at a right angle west one-quarter of a mile; thence at a right angle south thirteen rods; thence at a right angle east to the point of beginning, situate in the county of Shawnee and State of Kansas, made by said complainant, Morrell C. Keith, to the said defendant, Cyrus K. Holliday, dated August 19th, 1886, and recorded at page 335, in Book 125, in the office of the register of deeds of Shawnee county, Kansas; and said defendants pray an appeal to the Supreme Court of the United States, which is allowed, & bond on appeal is fixed at $500.00, said bond, with money deposited, being held & allowed as supersideas.

DAVID J. BREWER,
Circuit Judge.

Endorsed: No. 5934. Morrell C. Keith *vs.* Ed. P. Kellam and Cyrus K. Holliday. Decree. Filed June 5, 1888. A. S. Thomas, clerk, by Frank J. Thomas, deputy.

577 In the Circuit Court of the United States for the District of Kansas.

MORRELL C. KEITH
vs.
EDWARD P. KELLAM and CYRUS K. HOLLIDAY.

Opinion.

BREWER, *C. J.:*

This is a bill in equity brought by complainant to set aside a sale and conveyance of a certain tract of land in the city of Topeka made

on the 28th day of August, 1886, to defendant Holliday, and to have defendants adjudged as holding the legal title in trust for him. The contention of complainant is that defendant Kellam was his agent; that he was a joint purchaser with defendant Holliday, and that while assuming to act as such agent he withheld the information which he ought to have given, and thereby obtained a conveyance at less than the real value. The pivotal question is as to the relations of Kellam to the complainant. It is strenuously insisted by the defendants that whatever authority or agency he may have theretofore had in respect to the land was of a limited and special nature; that he was never an agent to sell; that complainant was advised that he expected to have an interest in the purchase, and therefore the parties dealt rightfully at arms-length.

On the other hand, complainant insists that defendant Kellam had acted as his agent in respect to this land for a series of years; that he was the only agent that he had had, and that their relations were such that he had the right to rely upon him, and did so rely in ignorance that Kellam was to share in the purchase and
578 believing that he was caring for his interests. Now, the facts in reference to the relation between these parties are these:

Complainant had owned the land for from eighteen to twenty years, but had not been in the city of Topeka nor seen the land during that time. Kellam had married the niece of his wife and had visited in his family as a relative. Their personal relations were friendly and familiar, one addressing the other in their correspondence as "Dear Ed.," and the other in response as "Dear Morrell." During all these years complainant had no one to look after this land in Topeka except defendant Kellam, and the latter had looked after his interests in the land in all things that have transpired to affect it up to this time. True, being unimproved land, there had not been many things requiring attention. He had paid the taxes on the land for complainant. He had informed complainant that the assessment was too high, and appeared before the county commissioners in behalf of complainant two or three times to have the assessment reduced. He accepted in behalf of complainant notice of the laying out of highways and resisted applications therefor. He notified complainant that a railroad company was seeking a way through the land, and by his instructions made resistance thereto. He settled with the railroad company, signing the receipt for damages, "M. C. Keith, by E. P. Kellam, agent."

About 1872 he suggested to complainant the fencing of the land, to which complainant assented. The fencing was done under his superintendence, but paid for by complainant, and thereafter he had the use of the land for the pasture of his own cows as well as of others, collecting pay for the latter and appropriating the same to his own use in consideration for the care of the land. He sold a few tree tops cut on the land and leased four acres for a
579 base-ball ground. He spoke of himself to parties who inquired about the land as the agent and discussed with them its value; received offers and promised to forward them. He suggested to complainant the propriety of platting the ground and

putting it in his hands for sale. He forwarded a plat of a subdivision that had been laid off immediately adjoining the tract. Now, these things were transpiring from time to time during a series of years. The only person in Topeka to whom complainant looked for the care of this land was defendant Kellam, and the only party there who assumed or appeared to have any control or authority to act for the owner was defendant Kellam. True, he had no authority to fix a price or make a sale, and in the narrow sense of the term he was not an agent to sell, and yet one cannot read the testimony of the relationship of these parties in respect to this land continuing through these many years without being impressed with the conviction that out of that there justly sprang a confidence which imposed special obligations on defendant Kellam.

It will not do to separate these different transactions and say that no one of them by itself was sufficient to establish a confidential relation. Cases are cited by defendants' counsel in which a party was employed to do a special act, as, for instance, the payment of taxes, in which it was properly held that from that alone no confidential relation sprang. The only fair way to look at it is to take all these transactions in the aggregate and determine therefrom how each must have regarded the other. No one can doubt a moment that complainant looked upon Kellam as his agent in respect to the land—as one who was caring for his interests, as one upon whom he had a right to rely; nor can there be much doubt, on the other hand, that Kellam during these years felt that he was
580 acting for Keith in the care of this land and was looking after the protection of Keith's interests. The fact that Kellam had no authority to make a sale or bind Keith by the acceptance of any terms in no manner disproves the confidential relations which subsisted between the parties. Now, what is the rule of law applicable to a case of that kind? Suppose a sale is accomplished through the instrumentality of one occupying such confidential relation. Happily the law speaks with no uncertain sound in answer to this question. In letters that are golden and that shine upon every page it affirms that one who has established such confidential relations must be absolutely loyal to that confidence. It is not enough that direct misrepresentation is avoided. Concealment and silence are fraudulent, and that, too, although they may not be with conscious intent to defraud—a silence from carelessness and neglect.

In the leading case of Michoud *vs.* Girod, 4 How., 503, the Supreme Court of the United States discussed at some length the matter of transactions by one having confidential relations with a party for whom he acts. I quote from that opinion: "And the rule of equity is, in every code of jurisprudence with which we are acquainted, that a purchase by a trustee or agent of the particular property of which he has the sale or in which he represents another, whether he has an interest in it or not (*per inter-positam personam*), carries fraud on the face of it." And again, "The general rule stands upon our great moral obligation to refrain from placing ourselves in relations which ordinarily excite a conflict between self-in-

terest and integrity. It restrains all agents, public and private, but the value of the prohibition is most felt and its application is more frequent in the private relations in which the vendor and purchaser may stand towards each other. The disability to purchase is
581 a consequence of that relation between them which imposes on the one a duty to protect the interest of the other, from the faithful discharge of which duty his own personal interest may withdraw him. In this conflict of interest the law wisely interposes. It does not act on the possibility that in some cases the sense of that duty may prevail over the motives of self-interest, but it provides against the probability in many cases and the danger in all cases that the dictates of self-interest will exercise a predominant influence and supersede that of duty." And once again, "The inquiry in such a case is not whether there was or was not fraud in fact. The purchase is void and will be set aside at the instance of the *cestui que trust.* and a resale ordered on the ground of the temptation to abuse and of the danger of imposition inaccessible to the eye of the court."

See also 1st Story's Equity Jurisprudence, section 383; 2nd Pomeroy's Equity Jurisprudence, sections 955 and following. In section 956 the author quotes with approval the language of Lord Chelmsford, L. R. 2, ch. 55, as follows:

"Wherever two persons stand in such a relation that while it continues confidence is naturally reposed by one and the influence which naturally grows out of that confidence is possessed by the other, and this confidence is abused or the influence is exerted to obtain an advantage at the expense of the confiding party, the person so availing himself of his position will not be permitted to retain the advantage, although the transaction could not have been impeached if no such confidential relation had existed."

Now, can it be doubted that complainant, living at a distance and for years never seeing this property or the city in which it was located, had a right to rely and did rely upon defendant, who knew the property and its surroundings, its present value, and all
582 the future prospects; who was his relative by marriage; who had paid his taxes for years and had looked after every matter affecting the land that had arisen during those years, and who was annually receiving out of the rental of the land compensation for such care and watchfulness—can there be a doubt, I repeat, that he did rely and had a right to rely upon him as upon one who, having cared for his interests in the past, would do so in the present? Not only is this reliance deducible from and justified by their past relations, its existence is evident also from the tenor of the letters during the negotiations for this sale. In May, '86, complainant wrote to Kellam and closed his letter with an inquiry as to what the land could be sold for; then, on June 30th, Kellam, at the instance of his codefendant, opens the correspondence which results in the sale. This correspondence continued, there being some fourteen letters backward and forward, to the 20th of September, '86. It is scarcely necessary to copy these various letters. The perusal of them shows that Keith was relying upon Kellam to protect his

interests. Though situated only a day's ride or such a matter from Topeka, and though the transaction was one amounting to sixty thousand dollars, complainant does not go there nor make any personal inquiries, but acts upon the offer communicated from Kellam. The very carelessness in which some of the letters are expressed and the manner in which the negotiations were carried on make it apparent that complainant supposed that Kellam was looking after his interests. This, as I said, is the pivotal question, and yet I think it unnecessary to comment on these facts further. It seems to me clear that complainant did rely and had a right to rely upon Kellam as one who was looking after his interests, and that Kellam must have felt conscious of that trust, or, if not actually conscious of it, was at least bound by it. While at the inception of the ne-
583 gotiations he may not have been interested with Holliday in the purchase, yet before the contract was finally closed he did become interested, and the purchase was on the joint account of Kellam and Holliday; and while Holliday may not have been possessed with knowledge of all of the relations between Keith and Kellam, yet he knew enough to put him upon inquiry, and that is equivalent to knowledge. So the purchase was in fact made by those who stood in confidential relations to the complainant. It goes without question under the testimony that Kellam did not disclose all the facts within his knowledge which would tend to affect complainant's willingness to sell or the matter of price. Hence, whether the price paid was adequate or not, complainant has a right to rescind the contract. Without entering into particulars it is enough to say that Kellam did not disclose offers which were made to him, prices which were put upon the land, the building of railroads into Topeka, which would naturally tend to affect the growth and prosperity of the place, or the speculation in real estate which was rapidly developing during that summer. It well may be that if these facts had been reported complainant might have declined to sell or at least named a higher price. It is certainly suggestive that within less than one month the purchasers, who had paid sixty thousand dollars, named twice that sum as their selling price.

In conclusion let me say that while I think complainant has a right to rescind this contract by reason of the failure on the part of his agent, a joint purchaser, to disclose all facts material to the matter of sale and the question of price, it is also due to the defendants to say that it does not appear that there was any conspiracy between them to defraud complainant or that they were seeking to obtain the land at less than its then real value. They stood in the early days of a remarkable real-estate speculation and they offered
584 and gave what was probably an adequate price, seeking only the chances of that growing speculation; but even that complainant was entitled to, and should have been advised of all facts that were known to Kellam throwing light upon present value or future prospects.

Complainant is entitled to a decree in accordance with the terms of his bill.

Endorsed: No. 5934. Morrell C. Keith *vs.* Edward P. Kellam *et al.* Opinion. Filed June 5, 1888. A. S. Thomas, clerk, by Frank H. Holt, deputy.

585 In the Circuit Court of the United States, District of Kansas.

MORRELL C. KEITH, Complainant,
vs.
E. P. KELLAM and C. K. HOLLIDAY, Defendants.

The Honorable C. G. Foster, one of the judges of the circuit court of the United States for the district of Kansas, to Morrell C. Keith, Greeting:

Whereas the said E. P. Kellam and C. K. Holliday have lately appealed to the Supreme Court of the United States from the decree lately rendered in the circuit court of the United States for the district of Kansas, made in favor of the said Morrell C. Keith, and have filed the security required by law and by order of the court in that behalf to supersede the enforcement of said decree:

You are therefore cited to appear before said Supreme Court, in the city of Washington, on the second Monday in October, 1888, next, to do and receive what may appertain to justice to be done in the premises.

Given under my hand, in the city of Topeka, in said district of Kansas, in the eighth circuit, the 2nd day of August, in the year of our Lord one thousand eight hundred and eighty-eight.

C. G. FOSTER, *Judge.*

I acknowledge service of the above citation this 3rd day of August, 1888.

A. BERGEN,
One of Solicitors for Compl't.

Endorsed: No. 5934. Morrell C. Keith *vs.* E. P. Kellam and C. K. Holliday. Citation on appeal and acknowledgement of service. Filed Aug. 3, 1888. A. S. Thomas, clerk, by Frank H. Holt, deputy.

586 In the Circuit Court of the United States, District of Kansas.

MORRELL C. KEITH, Complainant,
vs.
E. P. KELLAM and C. K. HOLLIDAY, Defendants.

Know all men by these presents that the said Cyrus K. Holliday and E. P. Kellam, as principals, and Mary D. Holliday, Charles K. Holliday, and T. J. Kellam, as sureties, are held and firmly bound unto the said Morrel C. Keith in the sum of five hundred dollars, well and truly to be paid to the said Morrell C. Keith, his heirs, administrators, and assigns, by the above bounden, their respective heirs, administrators, and assigns.

The condition of the above obligation is such that whereas the said C. K. Holliday and E. P. Kellam have severally prayed an appeal

to the Supreme Court of the United States from the final decree rendered in the above-entitled cause:

Now, if the said C. K. Holliday and E. P. Kellam shall prosecute their several appeal to effect in said Supreme Court and shall pay all costs and damages resulting to said Morrell C. Keith by reason of said appeal if the same should not be sustained, then the above obligation to be void; otherwise to remain in full force and virtue.

In testimony whereof we have hereunto set our hands this 30th day of June, 1888.

CYRUS K. HOLLIDAY.
MARY L. HOLLIDAY.
CHARLES K. HOLLIDAY.
T. J. KELLAM.

This is to certify that I have examined the above bond and hereby approve the same.

C. G. FOSTER, *Judge.*

Endorsed: No. 5934. U. S. circuit court. Morrell C. Keith *vs.* E. P. Kellam & C. K. Holliday. Super-deas bond. Filed Aug. 1, 1888. A. S. Thomas, clerk, by Frank H. Holt, deputy. Rossington, Smith & Dallas, attorneys, Topeka, Kan.

587 In the Circuit Court of the United States, District of Kansas.

MORRELL C. KEITH, Complainant,
vs.
EDWARD P. KELLAM *et al.*, Defendants. } Stipulation.

It is hereby stipulated by and between the parties to the above-entitled action that the original depositions and testimony filed by each party in this action may be withdrawn for the purpose of incorporating the same as a part of the record for the Supreme Court.

A. BERGEN, QUINTON & QUINTON,
Complainant's Solicitors.
JOHN T. MORTON &
ROSSINGTON, SMITH & DALLAS,
Defendants' Solicitors.

Endorsed: No. 5934. M. C. Keith *vs.* E. P. Kellam *et al.* Stipulation as to record for Supreme Court. Filed Oct. 8, 1888. A. S. Thomas, clerk, by Frank H. Holt, deputy.

588 UNITED STATES OF AMERICA, } *ss:*
District of Kansas, }

I, A. S. Thomas, clerk of the circuit court of the United States of America for the district of Kansas, do hereby certify the foregoing to be a true, full, and correct copy of the record and proceedings and also the original depositions and testimony incorporated in the foregoing record as per stipulation in the suit of Morrell C. Keith *vs.* Edward P. Kellam *et al.*, No. 5934, in said court.

The Seal of the Circuit Court of the United States, District of Kansas, 1862.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office, in Topeka, in said district of Kansas, this 8th day of October, A. D. 1888.

A. S. THOMAS, *Clerk.*

Endorsed on cover: Case No. 13,388. Kansas C. C. U. S. No. 269. E. P. Kellam and C. K. Holliday, appellants, *vs.* Morrell C. Keith. Filed October 19, 1888.

Office Supreme Court
FILED.
MAR 28 1892
JAMES H. McKENNEY,
CLERK

In the Supreme Court

OF THE UNITED STATES.

E. P. KELLAM and C. K. HOLLIDAY,
Appellants,

vs.

MORRELL C. KEITH, *Appellee.*

BRIEF AND ARGUMENT OF APPELLANTS.

W. H. ROSSINGTON,
CHAS. BLOOD SMITH,
EVERETT J. DALLAS,
Solicitors for Appellants.

JOHN T. MORTON,
Of Counsel.

HALL & O'DONALD, PRINTERS, TOPEKA. 24647.

In the Supreme Court
OF THE UNITED STATES.

E. P. KELLAM and C. K. HOLLIDAY, *Appellants*,

vs.

MORRELL C. KEITH, *Appellee.*

BRIEF AND ARGUMENT OF APPELLANTS.

STATEMENT OF THE CASE.

ON the nineteenth day of August, 1886, the appellee, Morrell C. Keith, of full age and without duress or persuasion, and voluntarily, executed his certain deed of conveyance to lands in Shawnee County, Kansas, to Cyrus K. Holliday, appellant, and received the full agreed consideration therefor in notes and in money.

The appellee, Keith, lives in Platte City, Nebraska, a State adjoining Kansas, and the negotiations looking to the acquirement of this land by Holliday and its sale by Keith were conducted by correspondence, lasting over a considerable period prior to the date of the conveyance, and the entire transaction was conducted in a leisurely way, without haste or precipitation. Nearly six months later, the appellee began his action to set aside such deed of conveyance.

The bill alleges, among other things, that the defendant, Kellam, was the "general agent of the complainant, as to the land; acted as complainant's agent in the care of said land in preventing waste upon it; in fencing and improving said land; in apprising complainant of the taxes levied thereon; in paying such taxes out of money furnished by complainant; in leasing and collecting the rents for said land; in protecting the interests of complainant in said land to the location of railroads and highways on said land, and collecting the damages thereto for said complainant; and in keeping said complainant informed of the value of said land from time to time; and that, throughout the negotiations and transactions relative to the sale thereof, he acted as the agent of the complainant; and that complainant did not know the value of said land, except as informed by said Kellam."

And it further alleges that

"On or about the fifteenth day of July, 1886, and before any bargain, agreement or contract of sale had been entered into by or between the said complainant and the said Cyrus K. Holliday, the said defendants entered into a conspiracy to fraudulently obtain the title to said land for themselves from said complainant at a price greatly less than its real value; and the said Edward P. Kellam having previously informed said complainant that said land was not worth more than sixty thousand dollars, as said Cyrus K. Holliday well knew, it was agreed between said defendants that said Edward P. Kellam, being then the agent of said complainant as aforesaid, as said Cyrus K. Holliday well knew, should endeavor to obtain from said complainant a conveyance of said land to said Cyrus K. Holliday for the sum of sixty thousand dollars, and should not inform said complainant that said land was worth more than said sixty thousand dollars, and that if such conveyance of said land could be obtained, the said Edward P. Kellam should become the owner of the undivided one-half of said land by a conveyance

thereof afterwards to be made by said C. K. Holliday, for a consideration which had been agreed upon by said defendants, the exact amount of which is unknown to complainant, but which complainant avers did not exceed the one-half of said sum of sixty thousand dollars.

"And your orator further represents that in pursuance of said fraudulent conspiracy, the said Edward P. Kellam, so being agent as aforesaid of said complainant, entered into correspondence with your orator relative to the sale of said land, and did never at any time communicate to him the fact that said land was worth more than sixty thousand dollars, nor the full facts aforesaid, whereby its value had been greatly enhanced.

"And your orator further represents unto your Honors that under the circumstances aforesaid, your orator, relying upon the fidelity of his said agent, Edward P. Kellam, to do his duty of informing your orator of the value of said land and of all things affecting such value, and relying upon the aforesaid representations of his agent, and being ignorant of the fact that said land was worth more than sixty thousand dollars, and believing that the same was worth no more than the said sum of sixty thousand dollars, and being ignorant of the full facts aforesaid enhancing its value, and being ignorant that his said agent, Edward P. Kellam, was to have any interest in said land or in said purchase, said complainant did, on said nineteenth day of August, 1886, make and acknowledge a deed conveying said land to the said Cyrus K. Holliday, and transmitted the same from complainant's said residence at North Platte, Nebraska, to his said agent, Edward P. Kellam, at Topeka, Kansas, to be delivered by him to said Cyrus K. Holliday, whereby the price of sixty thousand dollars should be paid or satisfactorily secured to his agent, Edward P. Kellam."

It is also averred in the bill that Kellam told Keith that the land was not worth more than sixty thousand dollars, and that Kellam had received offers in excess of sixty thousand dollars for the land prior to the conveyance to Holliday.

In addition to the general and specific averments of

Kellam's agency, the allegations of the bill may be summarized as follows:

1. A conspiracy between Kellam and Holliday.

2. That Kellam had previously informed Keith that the land was not worth more than sixty thousand dollars, and that Holliday knew this.

3. That Holliday well knew that Kellam was such agent of the complainant as is previously alleged in the bill.

4. That Kellam and Holliday agreed that Kellam should not inform complainant that the land was worth more than sixty thousand dollars.

5. That an arrangement was made before Kellam entered into correspondence with complainant that Kellam should become owner of an undivided half of the land.

The frame and purpose of the bill is to establish what is known to the law as a fiduciary relationship between Kellam and Keith, and then to bring Holliday into fraudulent connection with Kellam, so that the acts of Holliday would be the acts of Kellam and vice versa, and the relationship of the latter would be such as, in the language of the books, "would render his duties as an agent inconsistent with his acquiring any interest as a purchaser."

To this bill the appellant, Holliday, filed a verified answer, alleging upon information and belief that the appellant, Kellam, was not at any time the general agent of said complainant, or in any sense of the term an agent of said complainant to sell said land, or his agent for any compensation whatever to care for said land, or to pay the taxes thereon; but further alleging upon information and belief that the said Kellam paid the taxes on said land and cared for the same without any com-

pensation therefor, and without any agreement between him, the said Kellam, and the said complainant, that he, the said Kellam, should or would receive any compensation therefor, and without any expectation or intention on the part of said Kellam that he would receive any compensation for anything that he had done or was doing for said complainant in regard to said land. The answer further denied that said land was, on the nineteenth day of August, 1886, of the value of one hundred thousand dollars, and denied that said land could then have been sold for said sum; and also denied that the said defendant then knew or believed that said land could be sold for said sum; but on the contrary alleged that he, the said answering defendant, was a fair and reasonably good judge of the value of land in the vicinity of the city of Topeka, and that he then believed, and believed at the time of filing said answer, that said land could not then have been sold for said sum, and firmly believed that said land could not have been sold at the time said purchase was made from said complainant for a sum greater, or materially greater, than the sum of sixty thousand dollars. The said defendant, Holliday, in his answer further stated that he did not know positively whether said complainant was ignorant in reference to the value of said land, but he believed that owning such land as he did, and its value being so great, the said complainant had kept himself well informed as to its value, and was not ignorant thereof.

The answer further denied positively all conspiracy in said bill charged, and alleged that said Holliday and the said Kellam did not at any time conspire together to fraudulently purchase the said land from said complainant, either at a price less than its value, or any price;

and further alleged that the said defendants, Holliday and Kellam, did not agree that said Kellam as the agent of said complainant should represent to said complainant that said land was worth no more than sixty thousand dollars, and did not before the offer of said Holliday to purchase said land for the said sum of sixty thousand dollars was accepted, agree that the said Holliday and the said Kellam should jointly pay for said land, and that an undivided one-half thereof should be conveyed by said Holliday to said Kellam, and denied that it was pursuant to any such agreement, or any agreement, or any direction or authorization of the said Holliday, except as thereinafter stated, that the said Kellam as the agent of said complainant, or being with the knowledge of said Holliday the agent of said complainant, wrote to said complainant that said Holliday offered to pay said sum of sixty thousand dollars for said land, and that same was worth no more.

It is further denied by the said Holliday, in his answer filed to said bill, that the said defendants, Holliday and Kellam, jointly and in equal shares, or jointly or in any proportion whatever, paid the portion of cash which was to be paid upon the delivery of the said deed to said Holliday. But on the contrary it is alleged that said Kellam did not pay any part of that portion, but that the whole thereof was paid by the defendant, Holliday, and that the said defendant, Kellam, did not pay or repay to the said Holliday any portion of said money until on or about the thirtieth of March, 1887, after the commencement of the action.

And it is further denied by the defendant, Holliday, in his answer, that the complainant ever offered to restore and return to the said defendant all things or anything

which the said complainant had received from said defendant for said land, or that said complainant ever requested said defendant to make a reconveyance of said land, and further alleged that said defendant, Holliday, was never informed either directly or indirectly, by the complainant or by anyone, and never had cause or reason to believe that said complainant was not satisfied with his said sale, or desired to rescind the same, until after the commencement of the action.

The answer thereupon proceeds to recite in detail the real facts in the case, and the true history of the whole transaction referred to in the bill of complaint, a brief synopsis of which is as follows: That the defendant, Holliday, having been for many years largely interested in the prosperity of Topeka, and having devoted much time and careful consideration as to its future prospects and condition, came to the conclusion that in view of numerous projected enterprises connected with the city, it was highly probable that the prices of real estate in and near the city would be enhanced, and that sooner or later such appreciation in values would exist as to make investments in real estate in and near the city safe and even profitable. Being unacquainted with the postoffice address of the complainant, Keith, and understanding that the defendant, Kellam, was paying taxes on the land, and in correspondence with him, the defendant, Holliday, authorized said Kellam to write to the complainant stating that he was authorized by the said Holliday to say that he (Holliday) would give the complainant forty thousand dollars for the south half of the land, or sixty thousand dollars for the entire tract. No agreement was made that Kellam was to be interested in the proposed purchase, and no suggestion

made or offered on the part of either to that effect. This was in June, 1886, and about the ninth of July following, Kellam notified Holliday that the complainant had accepted his offer. Thereupon, correspondence was had with reference to the terms of purchase, and about the first of August the defendant was notified by Kellam that he had received an answer to the last proposal, in which said complainant had said that he "would take twenty-five thousand dollars down and the balance to suit you." After some deliberation the defendant, Holliday, concluded to accept the terms of complainant's last proposal, and upon the ninth of August he went to Boston to obtain the money, returning about the thirtieth of that month, and about the twentieth of September he paid the sum of twenty-five thousand dollars, and closed the transaction by executing his two promissory notes to the complainant for the sum of seventeen thousand five hundred dollars each, due in one and two years, respectively, secured by mortgage on the property. Prior to the final consummation of the deal by payment of the purchase money, but not until after the fifteenth of July, 1886, and, according to the best recollection of the defendant, Holliday, not until after the first of August, the defendant, Holliday, at the suggestion of Kellam, and upon his solicitation, agreed to allow Kellam to become the owner of half of said land upon the agreed consideration of one-half of the purchase money to Keith in the event the trade should be consummated. (See answer of Holliday, page 284 of Record.)

An answer was also duly sworn to and filed by the defendant, Kellam, in the case, denying in express terms that the said Kellam was ever the general agent of the complainant for a reasonable compensation, or for

any compensation, to care for the said lands, to pay the taxes thereon, or to sell the same, but that he did attend the payment of taxes on the said land and cared for the same without any compensation whatever, and without any expectation or intention that he should receive any compensation for anything he had done for said complainant in regard to the same. From the answer it appears that in 1877, or 1878, or 1879, when Kellam was at North Platte, Keith told him that if he would fence up that line of the land, which was open, he might make all that he could off of the land. This proposition was agreed to by Kellam, and at his own expense he fenced the same and kept up the fence thereon, receiving some rent for pasturage, and using the land to some extent for pasturing his own cattle thereon. Neither the expense of making said fence nor keeping the same in repair were ever repaid by or charged to the said Keith, and the only benefit that the defendant, Kellam, ever derived from what he had done with reference to said land was the small benefit derived from this pasturage. The defendant, Kellam, in his answer further denied all conspiracy in the bill charged, and averred that the said Kellam and said Holliday never at any time entered into such conspiracy or any conspiracy to fraudulently obtain the title to the lands for themselves, and denied that the said Kellam ever previously informed the said complainant that the land was not worth more than sixty thousand dollars, although it is alleged by the defendant in his answer that the value of the land on the nineteenth of August was not of the value of one hundred thousand dollars, and that it could not have been sold for more than the sum of sixty thousand dollars. The defendant further denied in his answer that prior to the acceptance by complainant of the offer made

by Holliday for the purchase of this land there was any agreement, arrangement or understanding whatever, between the said defendant, Kellam, and the said Holliday that the said Kellam should in any way become the owner of an undivided one-half of the said land, or any interest whatever therein. The answer thereupon proceeds to set out in detail a true statement of the facts and history of the transaction relative to the sale and purchase of the land in question, being substantially in accordance with a statement hereinbefore made. (See the answer of Kellam, page 289 of the Record.)

The complainant joined issue by replication, and at the June term of court, 1888, a decree was entered in favor of the complainant and against the defendants, setting aside the conveyance from Keith to Holliday, and also from Holliday to Kellam, and ordering the surrender and cancellation of all mortgages, notes, and other papers connected with the transaction, and decreeing that the same were and thenceforth should be null and void. From this decree the defendants appeal to this court.

SPECIFICATIONS WHEREIN SAID DECREE IS ERRONEOUS.

I. In that it is decreed that the contract for sale of the premises in said bill described between the appellee and appellant, Holliday, made on the nineteenth day of August, 1886, was, by reason of the matters in said bill of complaint set forth, fraudulent and void, because the proof fails to establish any fraud or imposition upon said appellee by said appellants.

II. In that it is decreed that the deed made by said appellee to said appellant, Cyrus K. Holliday, as set out and described in said decree, whereby the said appellee conveyed the premises to said appellant, Holliday, was

obtained in pursuance of a fraudulent contract, and was void and ought to be delivered up and canceled.

III. In that it is decreed that the deed made by Cyrus K. Holliday to Edward P. Kellam was made in pursuance of a fraudulent contract, and was fraudulent and void, and ought to be delivered up and canceled.

IV. In that it is decreed that the several deeds of conveyance and mortgages, notes and contracts in said bill mentioned, be, by the parties holding the same, delivered up to be canceled, and that each and every thereof is, and should be, thenceforth null and void.

V. In that it adjudges that said appellee have and recover of and from said appellants the costs of suit.

VI. Because from all the testimony, it appears that the transaction was a valid one, and one made and carried out in good faith by said appellants and without fraudulent intent or purpose, and that C. K. Holliday did not, unlawfully or otherwise, conspire with said Kellam, by concealment or otherwise, to defraud said Keith; and because from all the evidence the decree should have been in favor of said appellants and against said appellee, and said bill should have been dismissed at the cost of said appellee.

BRIEF AND ARGUMENT.

A sincere and honest review of this testimony, and a careful reading of it all, it seems to us, must leave upon the mind the impression that there is not a particle of proof to sustain a single charge of the bill, except the unsupported evidence of Keith that Kellam should have previously informed him that the land was not worth more than sixty thousand dollars. There is absolutely no proof to support the charge that Holliday fraudulently

conspired with Kellam for the purpose alleged in the bill, or for any purpose. Neither does the proof tend to establish, in our judgment, that Keith relied upon the judgment of Kellam, or that he dealt with him otherwise than at arm's length. In other words, the bill and the testimony of Keith in support of its averments, bear the unmistakable flavor of an afterthought, and a disposition to go back upon a bargain honestly made because subsequent to the making of it Keith either saw or was persuaded that the property had largely increased in value.

The testimony of Morrell C. Keith will be found beginning on page 151 of the Record. On page 154 he says:

"Q. 40. Did Edward P. Kellam at any time ever state to you what the value of said land was?

"A. 40. Yes, sir.

"Q. 41. What value did he state?

"A. 41. He said it was worth $20,000.

"Q. 42. When was that?

"A. 42. It was the last time he was here. I can't tell just when it was. It was about three years last summer or spring; that would be my recollection.

"Q. 43. When, if ever, did he state to you that the value of the land had increased?

"A. 43. He never stated to me at all.

"Q. 44. What, if any, knowledge had you of the building up of an addition to the city of Topeka beyond and west of the said land called Potwin Place?

"A. 44. None at all, sir."

This would bring the date of such alleged information to the Summer of 1884. Assuming that Kellam was there at the time Keith says he was, and that the infor-

mation was given at such time, there is no evidence that it was anything but the exact truth. In fact, the testimony of all the witnesses as to the value and rapid increase in value of Topeka city and suburban property between the years 1884 and 1887 would indicate that this would not be a low figure in 1884, and would not be a misleading statement for Kellam to make, unless, indeed, he desired Keith to hold on to the land to his (Keith's) injury. But there is a clear conflict of testimony as to when such information was given. If given when Kellam was at North Platte, it must have been as early as the Spring of 1879, for Kellam testifies that he had not been at that place since then, and if Kellam is mistaken in his testimony, it was an easy matter for Keith to show it. (See Kellam's deposition, page 46 of the Record, folio 83.)

Kellam testifies that he has informed Keith as to the value of the land, and in the same connection testifies that he made Keith an offer of forty thousand dollars for the land at Omaha, in 1885. (See Kellam's deposition, page 46 of the Record.)

That Kellam had made Keith an offer which Keith well remembered is proven by his own admissions, testified to by his own witness, Lester Eells, although it is pretty certain that Eells made the not very unnatural mistake of naming the wrong year. The time of the meeting of Keith and Kellam at Omaha is fixed, both by Kellam and Guy C. Barton, in November, 1885; and Keith told Barton on the twenty-second day of November, 1885, of the offer of Kellam, and thinks that he told him it was $40,000. It must then have been in January or February, 1886, that the talk between Keith and Eells (page 181 of the Record) took place; but it may

be an error of the notary. (See testimony of Lester Eells, page 181 of the Record.)

Keith further testifies (see page 165 of the Record), "I don't remember of ever talking to Mr. Kellam about the value of the property at any other time. Did not write or cause to be written letters to Mr. Kellam seeking for information as to the value of this land."

This is absolutely the only testimony which the complainant produces to support the allegation that we are now considering, viz.: that Kellam had previously informed him that the land was not worth more than $60,000; and in support of the following vitally prominent allegations of the bill, viz.:

1. That Kellam was the agent of Keith, "in keeping him informed of the value of said land from time to time."

2. That "throughout the negotiations and transactions relative to the sale thereof, Kellam acted as the agent of the complainant."

3. That complainant "did not know the value of said land, except as informed by said Kellam."

We are not unmindful of the fact that Keith testifies that Kellam was his "agent in every way connected with the land;" that he relied for information as to the value and circumstances affecting the value of the land, upon Kellam; that in the sale to Holliday he relied upon Kellam; that he "relied upon Kellam keeping him posted in regard to everything connected with the land;" and made several other general assertions to the same effect.

But we respectfully submit that such assertions are not, in any fair and reasonable sense of the term, testimony. As allegations in the bill, they are perhaps

admissible, as showing the issue to be made; but as evidence, they only show the conclusions and opinion of the witness.

To illustrate: Suppose that a witness not a party to the suit, had given the same testimony and made the same assertions. He would be at once asked, "How do you know that? State the facts known to you which lead you to these conclusions." The testimony of Keith is to be given under precisely the same rules, and to be regulated in the same manner as the testimony of a third party. And it is therefore plain that the proof of all these allegations rests in the unsupported assertion of Keith that Kellam, nearly four years ago, told him that the land was worth $20,000; that he had never spoken to Kellam about the value of the land at any other time; and that he never wrote or caused to be written any letter to Kellam, asking about the value of the land. Now, certainly an agency cannot be created by the act of one party alone; there must be an acceptance, either express or implied, on the part of the other. One man cannot be the agent of another without knowing it, or, at the very least, without being in possession of facts from which the law infers knowledge. And we ask, in serious earnest, what single fact is testified to by Keith, from which Kellam could even suspect that he was expected to keep Keith "informed from time to time of the value of the land;" that he was Keith's agent "in every way connected with the land;" that he was an agent to "keep him posted in regard to everything connected with the land;" or that Keith relied upon him, "in his negotiations with Holliday," in any respect, in regard to the price? The answer must be, "Absolutely, not one."

Keith does not inform us whether this alleged "in-

formation that the land was worth $20,000," was given in answer to an inquiry by him, or volunteered by Kellam, or was a casual and careless remark—easily misunderstood by Keith, easily forgotten by Kellam. One thing is reasonably plain, viz.: that if the remark was made by Kellam—whether in the Summer of 1884, as alleged by Keith, or in 1879, when Kellam testifies that he was at North Platte for the last time—Kellam did not underestimate the value of the property at the time. While no witness testified directly as to the value of the land in either of these years, yet the evidence is clear that the increase in values in city and suburban property in this locality did not occur until 1885. But Keith furnishes us the proof in the tax receipt for 1881, which is attached to his deposition as "Exhibit No. 9." (See Exhibit, p. 148.)

By reference to the exhibit attached, the original tax receipt, it will be seen that the valuation for 1881 of this land was $4,000.

Now, if the courts can take judicial notice of anything, on the ground that it is "a fact generally known and recognized," we submit that they must recognize the well known fact that assessors aim to place the assessments of land at one-third of the real value; and they certainly do not deal more liberally or kindly with non-residents than residents. This would fix the value of the property in 1881 at $12,000. So, on Keith's own statement, there is absolutely nothing that even tends to show that Kellam, at the only time that Keith says he talked with him about the value of the land, indicated that it was worth one cent less than it really was—still less to sustain the implied charge in the bill, that in connection with the sale to Holliday he had represented to Keith

that it was not worth more than he was offered. And it may be said here, that if Keith, whether with or without cause, had got the impression that Kellam rated the land at $20,000 in 1884, this could not have possibly influenced him in the Holliday sale, after Kellam had, at Omaha, in 1885, offered him $40,000—an offer which he refused, as he told his own witness Eells, "because the land was worth more."

As it is not shown, nor even now assumed, that there was any misrepresentation on the part of Kellam as to the value of the land, or that he had "informed complainant that it was not worth more than sixty thousand dollars," or that there was any such conspiracy between the defendants as alleged in the bill, it is in order to inquire next, "What were the relations of Kellam and Keith?"

We submit that, laying aside the inferences, opinions and "understanding" testified to by Keith, and looking only at the facts proven, they were simply these:

1. Kellam was the *tenant* of Keith, paying his rent, either by looking after the taxes in the manner mentioned hereafter, and preventing trespass, as testified to by Keith, or by building and keeping in repair the fences, as sworn to by Kellam—collecting rent, *not for Keith*, as alleged in the bill, but for *himself*, as he had a right to do, for pasturage, under his admitted agreement with Keith.

2. He was the agent of Keith for certain limited purposes, viz.: To report to Keith the amount of the taxes, and when, thereafter, he was furnished by Keith with the money, to pay them.

3. In certain special instances, and when specially requested, he acted as Keith's agent in reference to condemnation proceedings—right of way—and in one

instance in receiving, from the treasurer, condemnation money ($200) on a receipt signed by Keith, as admitted by Keith's solicitors on the hearing, and as testified to by Kellam, on page 52 of Record, and only *additionally* signed by Kellam as agent, *at the request of the treasurer*, as an identification, or guarantee of genuineness.

That this is a fair and candid statement of the relations of Kellam and Keith is clearly and reasonably to be gathered from the evidence; and as this may be said to be a sort of "*quasi* criminal proceeding," we may be allowed to say that the evidence is "inconsistent with any other reasonable hypothesis."

It is certainly unnecessary to attempt, either by authority or argument, to show that the relation of landlord and tenant is not such as to preclude the tenant from purchasing the property from the landlord at any price, if he makes no fraudulent representations; and that he can, in such purchase, avail himself of the knowledge of the value which he has acquired by his tenancy without being required, either by law or equity, to express his own opinion as to the value, or say to him, "I will give you so much, but you will be a fool to take it, as I think there is every prospect of a railroad being constructed somewhere in the neighborhood." From the very nature of the case he has a better opportunity than the landlord to form an opinion as to value, at least as to many of the elements which enter into it, especially as to its value for actual use; but this the landlord well knows, and must govern himself accordingly. An ordinary tenant, too, is morally bound to look after the interests of his landlord in many respects—in preventing trespass and waste, and we suppose it is his moral duty, as well as *his interest*, to do just what Kellam did, viz.: to notify

his landlord of any attempt to appropriate the land under the right of eminent domain, and of any notice served upon him during his tenancy affecting such appropriation or the title. In short, it is his own interest to do just what Kellam for *his own interest* did, by warning Keith of any attempt to disturb the existing condition of the land in his occupancy; for there is no proof that there was any arrangement between them which made it a part of Kellam's duty to so act. In each instance he would, and obviously for his *own interest* as a tenant, notify Keith of the proceedings, and then receive a request to act in that particular case. And certainly this relation of landlord and tenant and the obligations and disabilities growing out of it are not in any way affected by the manner in which the rent is paid, unless, perhaps, it is paid in whole or in part by accepting an agency to sell the land or to find a purchaser, coupled with a discretion as to the price, or an agreement to keep the owner informed as to the value; and under the evidence there can be no claim that such an agency was accepted or even offered. It will not and cannot be claimed that mere tenancy creates any such "fiduciary relation" as that claimed to have existed between Keith and Kellam.

We come next to the agency of Kellam, in regard to the taxes. We are perfectly willing to admit, for all the purposes of the case, that the status of Kellam in this respect was such that he could not have bought the land at tax sale without being held to be a trustee for Keith, and compellable to convey to him. But we submit that it is not the law that a limited agency, to ascertain the amount of the tax levied, report the same to the principal, and on receipt of the amount thus reported, pay the tax and transmit the receipt, creates any such "fiduciary

relation" as to disqualify the agent from treating with his principal as if he were a stranger. Certainly, the principle is the same as in the case of personal property. Law, in the main, is square, common sense, applied to business transactions — except, perhaps, some statutory law. Now if A sends B to the treasurer's office to ascertain the tax levied upon his horse, reports the amount, receives it, pays the tax, and delivers the receipt—containing, as it does, the valuation—does this disable B from buying the animal at a half price from A, just as if they were total strangers? Does not the question answer itself? And we call attention to the fact that we have stated the agency of Kellam, in this respect, in substantially the language of the bill. (See first page of the bill of complaint.)

And for the convenience of the court we here quote the bill: "In apprising the complainant of the taxes levied thereon from year to year, and in paying such taxes out of money furnished by the complainant." As to the status of the parties in regard to *this* agency, there is no contention.

The agency of Kellam in this respect was not such as to preclude him from dealing with Keith as if they were strangers. It did not give Kellam any better chance to ascertain the valuation of the land by the assessor, than it gave Keith—for the exact valuation is inserted in the tax receipts sent by Kellam to Keith. It did not give Kellam any better opportunity to inform himself of its true value, for such opportunity was only given by his residing nearer to the property; and it would be a curious proposition that a citizen of Topeka, purchasing from a non-resident, would be liable to have the deed canceled on the ground that he lived nearer to the land,

and thus knew that the property was worth more than he offered.

It will be claimed, perhaps, that Keith testifies that Kellam was his agent for the sale of this land, but reference to the testimony will show that such claim involves a gross error. Nowhere in his testimony does Keith testify to any such thing.

It will be further claimed that when in 1880 he was written to by Ross & Company for a price on the land, he referred the matter to Kellam. That such a claim is untenable will be gathered from the testimony itself. By reference to Kellam's deposition, taken the third day of November, 1887, it will be seen that the original letter of Ross and Keith's letter transmitting Ross' letter to Kellam are attached as "Exhibit B." And this letter of Keith shows that in this, as in all other matters, he retained his *grasp* and *absolute control* of the most minute matters connected with the land, not "*referring*" anything to Kellam, and trusting nothing to Kellam's advice or judgment, but promptly deciding for himself. Here is the letter:

"NORTH PLATTE, Feb. 27, 1880.

"DEAR ED.: Enclosed you will find a letter from some man over there. The best thing to do is, tell him that I don't want to sell. It has cost me more than he offers. Get the lowest price on that piece north of mine.

Yours truly,

M. C. KEITH."

The theory of the bill, and the theory upon which the case was tried by the complainant and decided by the court below, is that the sale was a sale to Kellam, and that Holliday conspired with him to abuse the trust and confidence of Keith, and thereby became a participator in the wrong, if any, charged to Kellam. There is not

a syllable of proof to support this theory. There is not a word of testimony to support the notion that in the sale or disposition of the land Keith trusted to anybody's counsel or acted upon anybody's advice save his own. It is proven, and conclusively proven, that Keith knew that Kellam wanted to become the purchaser of the land. The very letter which he writes to Kellam in response to the letter conveying the offer of Holliday would conclusively indicate that he knew that Kellam had sought to be a purchaser of the land, and that he was dealing with him as with any other purchaser — at arm's length. In that very letter he gave perhaps the cue which inspired Kellam to request of Holliday that he might have an interest in the purchase. In that very letter he expressed a willingness, nay, a desire that Kellam himself should be the purchaser. He said, "I will take that man's offer, if he takes it within a few days. *I would rather you would have it.*" It is in testimony, and not contradicted, that more than a year before he had been offered by Kellam forty thousand dollars for the tract. Assuming the testimony to be true that two or three years previous Kellam had told him that the land was worth twenty thousand dollars, he was there apprised of a large and rapid increase in value of the land. The purchases referred to — or offers of purchase — were all of what are known as of a "boom" nature by real estate agents who had not a dollar of their own money to put up, but who proposed to plat the land and get up an excitement over it and sell as much as they could of it and put the money in their pockets, paying perhaps one-third or one-half down, and if the enterprise should fail, turning back the balance of land on their hands. Keith knew this. He knew

that the offer he was receiving was the best offer that had been made to him. He wanted the money, and he wanted it in a few days, but he could not help being apprised by these repeated offers without commentary that the land had very rapidly enhanced in value. There is not a syllable of testimony that Kellam said or intimated that the price offered was the best price to be obtained for the land, and Kellam had no reason to know or believe that the offer of June 30, 1886, would be accepted or treated otherwise than the previous offers made by or through him had been treated, or that it would not be rejected.

But the offer made, when made, was not the offer of Kellam, but the offer of Holliday. There is not a word of proof to show, but on the contrary the testimony establishes that when Holliday made this offer he made what he believed to be the outside fair price for payment in cash and bankable notes for the land. Keith knew that every note he received in addition to the cash could be readily negotiated at bank, and he could obtain his money at once, and that, it is clear to us and must be clear to anybody who examines this testimony with a candid mind, was the moving impulse of its acceptance.

The misapprehension into which the Court fell, in our judgment of this case, was that, because Kellam—by the grace of Holliday and not by the grace of Keith—acquired an interest in this purchase after the sale to Holliday, that the deed to Holliday and the purchase made by Holliday in good faith and fairly should be set aside and annulled, because Kellam had had charge of the paying of taxes and other matters relating to this land, and because the proposition was transmitted through him. We think that the books nowhere contain a par-

allel case, and nowhere decide or hold a principle so far-reaching and stringent as this. Whatever a chancellor might feel free to do in the exercise of extreme solicitude in the maintenance of a rule of judicial policy, provided the contract of purchase and sale and its execution by conveyance was with the agent solely, he cannot by any rule of reason or simple justice extend the principle against rights fairly acquired by one who has no fiduciary relationship with the grantor. It is not claimed that Keith ever met Holliday. It is not contended that Holliday had any reason to believe or suppose that his proposition would be accepted if transmitted through Kellam. Every fact and circumstance in the case belies such a supposition upon Holliday's part; for if Holliday had fraudulently conceived the notion of using Kellam to deceive and cajole and overreach Keith, it stands to reason that he would have used every endeavor to bring about a speedy adjustment and settlement of the matter. But the transaction itself bears no ear-mark of fraud. Ample time was given to Keith to investigate and pass upon the bargain he had made. Delays were brought about by Holliday himself in the perfecting of certain details of title before the bargain was finally consummated and the money passed. Every act of Holliday's in the matter indicates sincerity, good faith and an honest purpose to make and carry out an honorable transaction. Although it is outside of the record, it is only fair to say that after thirty years of honorable and just life in the community in which he lives, during which he has prosecuted an active and successful business career, his most malignant enemy, if he have one, cannot put his finger upon a single questionable transaction of which he has ever been guilty.

The Court finds that Kellam occupied a fiduciary relation towards Keith, but does not define or limit the nature of that fiduciary relationship; nor does the Court in its opinion find the truth of the allegations of the bill that Keith relied upon Kellam to inform him of the value of the land, or that he would have been governed in any respect in determining what he should do by Kellam's opinion upon that subject.

The Court says:

"It seems to me clear that complainant did rely and had a right to rely upon Kellam as one who was looking after his interests, and that Kellam must have felt conscious of that trust, or, if not actually conscious of it, was at least bound by it. While at the inception of the negotiations he may not have been interested with Holliday in the purchase, yet before the contract was finally closed he did become interested, and the purchase was on the joint account of Kellam and Holliday; and while Holliday may not have been possessed with knowledge of all of the relations between Keith and Kellam, yet he knew enough to put him upon inquiry, and that is equivalent to knowledge."

And right here we think the Court committed its error. Is it a tenable or reasonable proposition that if Holliday had received his deed from Keith under all the facts and circumstances shown by the proof in this case and had paid his money, and parted with no interest to Kellam, even though the bargain and transaction were made through Kellam in the manner in which it was made, that Keith could set aside the conveyance upon the ground of the fiduciary relationship of the go-between, Kellam, to Keith? The transaction should have been upheld for the simple reason that Holliday owed no duty to Keith; that he was not his keeper; that Keith was free to accept or reject the offer made, and particularly

an offer made as this one was, without any recommendation upon the part of Kellam. Can there be any difference *quoad* Holliday because he consents after the bargain is closed to convey a part interest to Kellam?

Keith, in his letter of July 7th, expresses a desire that Kellam should have the land and should purchase it. He knew that Kellam desired to purchase it. Can Holliday be said to be blameworthy, being advised of Keith's wishes in this behalf, that he consented, after the bargain had been made and concluded, that Kellam should have an interest in the purchase? If Kellam had never purchased or acquired an interest in this property at all, Keith would never have contended that he was overreached, and could not under the circumstances have successfully set aside the purchase made in the frank, straightforward manner that it was. It is only because Kellam, at the behest of Keith, or with Keith's consent, acquired an interest in such purchase, that the question of fiduciary relationship arises at all; because the Court does not find, and cannot find that any conspiracy of a fraudulent character existed between Kellam and Holliday touching the purchase of this land. Holliday's interest thus honestly acquired, however, is divested by the Court's decree — why? "That while Holliday may not have been possessed of knowledge of all the relations between Keith and Kellam, yet he knew enough to put him upon inquiry, and that is equivalent to knowledge." To put him upon inquiry of what? Of the fact that Kellam had been acting as Keith's agent? No fraudulent purpose can be presumed from that fact alone. If he knew the full measure of Kellam's agency and relationship to Keith as shown by this testimony, he could not be charged with any fraudulent purpose unless he

conceived such purpose and unless he connived with Kellam to carry it out. He conceived he was offering full value for the land. He authorized such offer to be made; he carried it out, and the correspondence was conducted in such a way as to leave upon the mind of any honest man—and particularly the mind of one who knew the characteristics of Keith—the impression that he (Keith) was doing what he did do deliberately and with full knowledge.

Topeka and Platte City are not more than a day's journey apart. The first letter from Kellam to Keith was written on the thirtieth of June, and was not answered by Keith until the seventh of July. The response of Kellam was on the thirteenth of July, and was not answered until the twentieth of July. To a letter written on the twenty-seventh of July, he replied on the twenty-ninth of July, to which Kellam's response was made on the 4th of August, and the transaction was not finally closed until the twentieth of September. Nowhere in the correspondence or testimony is there anything which would put Holliday upon inquiry as to whether Kellam was or was not dealing in the most absolute good faith with Keith; and if put upon inquiry—if Holliday could have indulged a suspicion upon that point—there was not a thing in the correspondence or transaction that would convince him that there was any foundation of wrong intention to support his suspicion. Therefore, the Court's reasoning in thus divesting Holliday's interest is, in our judgment, unsound.

If Holliday had known—which he did not know, and which was not the fact—that Kellam was an agent to sell the land for Keith, he would have had a perfect right, indeed it would have been his privilege and the

natural and proper thing for him to do, to make his offer through such agent, and if he made it in good faith and the agent transmitted it, and it was subsequently accepted, he would not be bound to assume or even suspect, that the agent concealed any fact from his principal which induced the acceptance of such offer; and if such offer were accepted and the contract executed, while Keith might have an action for damages against his agent for wrong doing, he could have no claim to recover his property against the person who had dealt fairly with such agent under the circumstances.

The cases which were cited in the argument to the court below, and which will be cited to this Court, in every instance were flagrant examples of actual wrong and imposition. The leading case of *Michoud v. Girod*, 4 How. 503, which is cited approvingly by the court in its opinion, and from the language of which it draws the principle which it is claimed governs this case, presented this state of facts: That Nicholas Girod and brother, being executors of an estate, became possessors of such estate by purchasing it in through the instrumentality of another—a merely nominal buyer. There can be no analogy between such a case and the one at bar. These executors were trustees to sell and dispose of this estate, and they entered into a conspiracy with a nominal buyer to purchase it in for their own use and benefit. Of course, no such proceeding could stand in equity. That is not this case, and no general principle of law which would be asserted in denouncing a transaction of that character could be applicable to a case like the one at bar, so far as the appellant, Holliday, is concerned.

Of course, we understand the rule of law to be as laid

down by Lord Chelmsford and cited in the Court's opinion, as follows:

"Wherever two persons stand in such a relation that while it continues confidence is naturally reposed by one and the influence which naturally grows out of that confidence is possessed by the other, and this confidence is abused or the influence is exerted to obtain an advantage at the expense of the confiding party, the person so availing himself of his position will not be permitted to retain the advantage, although the transaction could not have been impeached if no such confidential relation had existed."

And it would seem from adjudicated cases that it would make little difference whether the price given by the agent to his principal was adequate or reasonable, or not, provided there was any misrepresentation or concealment. But there is no case, and there should be none, which would hold the doctrine that a purchaser having no fiduciary relationship, who buys in good faith, should be divested of his title because one who had a fiduciary relationship might act as an intermediary. To hold to such a doctrine would imperil every transaction of life. Sound principles of justice and of public policy do not call for the enunciation of such extreme doctrine; on the contrary, it seems to us they should deny its existence. But an examination of all of the cases that were cited below, or that may be cited to the Court here proves them inapplicable as to parity of facts and circumstances to the case at bar, and clearly distinguishable from this case.

But let us examine this testimony, as we examined it in the court below, to see whether or not Kellam has been guilty of any fraud or imposition upon Keith, or whether Keith's testimony is consistent, or his memory reliable, as to facts which he claims to exist.

As to the other relations, connected with the land, be-

tween Keith and Kellam when Kellam acted, in reference to condemnation and right of way, in special instances and at the special request of Keith, as made in such letters of Keith's as those attached to Kellam's deposition, as exhibits "A" and "B," there is not anything in them to prevent Kellam from dealing with Keith as if they were perfect strangers. What he did in those matters gave him no better opportunity to judge of the value of the land than he otherwise would have had, from the accidental fact that he lived in the vicinity. When in each instance he had done what Keith had requested him to do, that special agency terminated. As one of these special instances, we refer again to drawing the condemnation money, with the receipt signed by Keith himself, and sent to Kellam, to enable him to draw the money. And we may class in those instances at least four of the communications to Kellam, made during the correspondence relating to the sale, viz.: those in exhibits "D," "E," "F" and "G." In all these letters it is perfectly plain that Keith retained everything in his own grasp—trusting Kellam with no discretion—relying on him for no information, and, most clearly, for no information connected with value, or as to whether the growth and status of the city were getting to be such that it would or would not be to his benefit to allow the appropriation. In short, he not only acted on his own judgment, but plainly indicated to Kellam that he was determined to do so.

And in this connection, and perhaps somewhat out of place, because relating to value, we refer to the amount of the condemnation money as shown by the receipt to the treasurer. This strip, so condemned, we presume is the usual 200 feet; but call it, as it may have been, 100 feet.

The land is of uniform width east and west, viz.: one-quarter mile, and the T. S. & W. R. R. ran east and west. Here, then, was a strip six and one-sixteenth rods wide and forty rods long; this is a little over three acres. Under sec. 4, art. 12 of the constitution, the damages in such cases cannot be properly assessed at less than the actual value of the land; and yet the commissioners assessed the land at only two hundred dollars! This was $65 an acre, or less, if they assessed any damage to the rest of the land. If the theory of the complainant as to value is true, would sworn commissioners have made such a valuation? Would a railroad company have permitted it, and risked the cost and trouble of an appeal? At the very least, it tends to show that the northern portion of the land is comparatively worthless—a fact overlooked by the real estate men who testified to such a high valuation; the honest ones of whom were innocently biased by the interest they had in keeping up values, as tending to increase their percentage on sales, and the reckless of whom needed no innocence in their bias. And among the latter we class the man Ferguson, who got himself recalled because "Mr. Quinton is a friend of mine, and I would like to see him win the suit;" and who testified on his recall, that when first on the witness stand, "I did not suppose that I would be allowed to state that Mr. Kellam said his uncle would rely on him as to the price," when the fact was that a large portion of his evidence, the first time, was to *what Kellam said.* (See p. 216 of Record.)

Sometimes it is self-advisable for men to have long memories.

There is, however, another point in reference to which the amount of this condemnation award may be properly

taken into consideration, and that is to test the *accuracy of Mr. Keith's memory*. He testifies that Kellam told him *at North Platte* that the land was worth $20,000. (See p. 154 of Record.) This is denied by Kellam. Now Kellam testifies (see p. 44 of Record) that he has never been in North Platte since *1879*. If Kellam is mistaken in that, there were two ways for Keith to show it. The court would have undoubtedly extended the time, and allowed Keith to be recalled; or perhaps, better still, the complainant could have called Guy C. Barton, his business partner, whose testimony was taken in this city on the eighth day of November, 1887, *some time after* Kellam's, and who would, as he was an intimate friend of both Keith and Kellam, have seen the latter at Omaha, on his way to North Platte. It seems very clear, then, that if Kellam ever told Keith at North Platte that the land was worth $20,000, he could not have told him so since 1879; and if he had told him so *then*, Keith would have directed Kellam to appeal from an award so much at variance with the figure that he *says* Kellam had given him. At any rate he would, especially if his relations with Kellam were such as are alleged in the bill, have had a lively correspondence with him in reference to it before he requested him to draw the money, and signed and sent him a receipt for that purpose. The inference may then be fairly arrived at, that Kellam and Keith *never* talked about the value, for Keith says that was the *only* time that they ever *did;* and this most effectually disposes of the theory that Keith relied to any extent whatever upon Kellam for information as to the value of the property, or in any way protecting the interests of complainant in it, either as to its present or prospective value. And it certainly

needs no argument to prove that if Kellam's relations with Keith in reference to the land were such as to purchase the property of Keith as if they were strangers, he could buy an interest in it in *just the way* in which the bill—falsely, as we claim—alleges that he bought.

We now come to the correspondence connected with the purchase, which correspondence constitutes, in fact, the entire negotiation, with the single exception of what passed between Kellam and Holliday, and a "difference of opinion between counsel," for that is all that it amounts to, as to the contents of the letter of July 27th. There is no dispute as to these negotiations in the minutest particular.

On the 30th of June, Holliday, not knowing the address of Keith, and knowing that Kellam was corresponding with him, prepared an offer for the land and requested Kellam to submit it to Keith. (See Record, page 18, being all the testimony on this point.) Kellam complied with this request by writing a letter. (Exhibit 1; see Record, page 146.) This letter is as follows:

"TOPEKA, KANS., June 30th, 1886.

"DEAR MORRELL: A gentleman here wishes me to ask you if you will take a thousand dollars an acre for the south forty of your tract, or sixty thousand dollars for the whole? He wishes an early reply.

"All well. Truly yours,

E. P. KELLAM."

Not one word of advice in the letter—nothing to indicate to Keith that Kellam thought that he was considered by Keith as an agent, and everything to indicate to Keith that he, Kellam, assumed that Keith was, as he had theretofore intimated he was, holding everything in his own grasp, and relying solely upon his own judgment.

Now, in reference to this request of Holliday to Kel-

lam, and the compliance with it by the latter, it was asserted by complainant's counsel that it made Kellam the agent of Holliday. This is in direct conflict with the bill, which avers that *throughout the negotiations* "Kellam acted as the agent of Keith" to purchase the land. We might well admit that it did make Kellam such agent, and then say, "There is an end of the case," for the letter of Kellam to Keith fully and fairly disclosed to Keith the facts which made Kellam such agent, and fairly and honestly, with "*uberrima fides*," put Keith on his guard, and in possession of all the facts, not only to protect himself but to warn him that he must trust to himself alone.

It has to be admitted by complainant's counsel that Kellam was not in any sense the agent of Keith to sell the land or to find a purchaser. And as to whatever other relationship, agency or trust can be possibly found from the evidence, looking at it entirely from the complainant's standpoint, the moment that Keith received this frank notice from Kellam that he was the agent of another "to purchase," they "dealt at arm's length." That would be too plain to waste another word on, and the end of the case is reached.

We think that the Court may take that view of the case; and in view of the facts that Kellam, with the knowledge of Keith, made out the notes and mortgages for Holliday to execute, and that Keith nowhere in his letters treats Kellam as his agent, we think it is correct. Yet we can certainly claim, as an impregnably safe position, that it placed Kellam in no worse position in reference to this case than that he was and acted as a "middleman" to bring the parties together, and when he had done this, simply acted as "the telegraphic wire"

along which the communications from one to the other were transmitted. Now, it is plain that if Kellam occupied this position and acted fairly in transmitting the messages between the parties, he had a perfect right to become interested in the purchase, even if it was intended from the start that he should be (which was not the case). There are but a few cases reported in which "middlemen" figure, but we refer to two as throwing some light upon the freedom of his position: *Orton v. Schofield*, 61 Wis. 382; *Siegel v. Gould*, 7 Lansing (N.Y.) 177; also *Rapp v. Sampson*, 16 Gray, 401.

It is no digression to refer here to another of the careless — we might say reckless — statements made by counsel, in their brief below. It was there stated that "it is admitted that Holliday knew of Kellam's connection with the land and complainant." There was a manifest intention to impress upon the court the idea that he knew of *such* a connection of Kellam's as *that alleged* in the bill, and supported only by the opinions, conclusions and general statements, unsupported by proved facts of Keith. Now, where is there any such admission?

On page 18 of the Record it will be seen that Holliday simply testified that he knew that Kellam was in correspondence with Keith. Holliday further says (pp. 27 and 28 of Record) "That he never knew that Kellam was Keith's agent to sell the land, and that his agency was only to have an eye on it in a friendly way, as a relative; that, as far as a man could know these things, he knew that Kellam was not an agent to sell the land; that he knew that Kellam paid the taxes." (Record, p. 33.)

And this is *absolutely all* the testimony that there is in relation to the knowledge by Holliday of Kellam's posi-

tion on which to base the assertion that Holliday is admitted to have known that Kellam was Keith's agent, to keep him posted from time to time as to the value of the land. We admit that *such* a misstatement must have been an *honest* and not an *intentional* error.

Kellam having, then, either as agent of Holliday or as "middleman," to bring the parties together, sent this letter to Keith, Keith having taken five or at least four days to consider, sends his answer of July 7, as follows:

"FRIEND KELLAM: I will take that man's offer, if he takes it within a few days. I would rather you would have it. Yours truly, M. C. KEITH."

Terse as this answer is, it shows that Keith was acting entirely upon his own iron judgment in the matter, neither wanting Kellam's opinion about it nor influenced by anything that had ever passed between him and Kellam. It may be here remarked, that as Holliday's offer was in the alternative, that is, that it was an offer for the south forty and also an offer for the whole, it may seem strange that Keith did not state which offer he would accept. But, as both parties clearly, from this time forward, agreed in treating it as an acceptance of the *larger offer*, there is no difficulty in the matter. Holliday's offer and Keith's acceptance are to be treated as an offer and acceptance of the larger sum, and for the entire tract.

But the last sentence in this letter is more than significant. Aside from its connection with that other letter—the one of July 27th, from Kellam to Keith—it is important if not decisive, even as standing alone: "I would rather you would have it." Now, we submit that this was precisely the same thing as if he had said, "I would rather you would have it at that figure. If you had of-

fered me the same price, I should have accepted the offer, and would have been glad that you had got the land at that figure." In short, he placed the matter, so far as he himself was concerned, in just the same position as if Kellam had made the offer instead of Holliday. He accepted the same price that he would have agreed to if Kellam had been the avowed purchaser. How, then, even if we should admit everything which the complainant's counsel in their briefs claim to have proved, can Keith allege that he has been injured? He received the same price for which he wished to sell it to Kellam. He indirectly invited Kellam to become the purchaser at that price, and directly "put it into his head" to join in with Holliday in the purchase.

To illustrate: Suppose—keeping in mind the fact that there is not a particle of evidence that Kellam had misrepresented the value to Keith; that there is no evidence that he was to post Keith as to value; that there is nothing even tending to show that Keith ever talked to Kellam about the value but once (in 1879 or 1883), and that this one "talk" is positively denied by Kellam; and that, all through, Keith shows no disposition to rely upon the judgment of anyone but himself—that Keith had said, in his letter, "This man offers me $60,000, but let us drop him, and I will sell to you at that price—will you give it?" If Kellam had closed with the offer, Holliday might have enforced a conveyance from Kellam, but Keith most assuredly could not. And where is the difference between the actual and the supposed case? If anything could increase the "arm's length distance" between Keith and Kellam, especially as Kellam had shown an anxiety to purchase by offering Keith $40,000 for the land, it would be this letter.

The matter, then, being so closely analogous, from the standpoint of view of the complainant, to a purchase by Kellam from Keith, we assume that the law is, even if Kellam was such an agent of Keith's as is claimed by him, that the moment that Kellam and Keith commenced negotiations, even when Kellam made a first offer and was listened to by Keith, the agency ceased, and Keith assumed the burden of trusting to his own judgment. Some of the authorities say that the agency ceases "when he becomes the purchaser." But that means, of course, when negotiations commence; for it would be simple nonsense to exclude the interval. We believe the latest ruling on this point is by the Supreme Court of Iowa—certainly high authority. We refer to *Collar v. Ford*, 45 Iowa, 331, and especially to pages 336 and 337.

To return to the correspondence. This letter was received by Kellam on the ninth day of July, but, with a delay entirely inconsistent with the theory of a corrupt conspiracy, was not answered until the 13th. Kellam then wrote:

"TOPEKA, KAS., July 13, 1886.

"DEAR MORRELL:—Yours to hand in due time, but I could not answer sooner. If you are still inclined to take this offer for the land, we would like to know how much you would require down, and the time and rate of interest on the deferred payments. I think there is no doubt but that he will take it, if terms are satisfactory.

"Yours truly, E. P. KELLAM.

"Weather hot and dry."

Nothing in this indicating a disposition to hurry the matter.

Kellam received no answer to this letter until the 24th, but still did not hurry Keith. On the 24th he received the unsigned letter of Keith, copied below:

"NORTH PLATTE, NEB., July 20.

"FRIEND ED.:—I don't think I want to sell on time; but tell him to make me a proposition, and I will tell him what I will do."

(Letter admitted by Keith. See Exhibit E, Record, p. 14.)

This letter should have reached Topeka, if correctly dated, on the 21st, or at farthest on the 22d, as we will show in referring to the letter of July 27th. It was immediately shown to Holliday, but, with the usual deliberation and lack of haste marking the proceedings of the defendants, it was not answered until the 27th. On that day, at the request of Holliday, Kellam wrote a letter to Keith, which is practically admitted by the latter, when he says: "These were about all the letters received by me from Mr. Kellam in regard to the sale of this land. I have not the others." (See also p. 156, Record, *et seq.*)

This letter, suspiciously enough, is not produced by Mr. Keith. The letters of June 30th and July 13th are produced and attached as exhibits, as also those from Kellam of August 4 and later dates. This one alone, of the series relating to the sale, is missing. Verily, the fire testified to by Mr. Keith, which destroyed his correspondence, was a discriminating one!

The only evidence as to the contents of this letter is to be found in the deposition of Kellam. The letter opens with an offer from Holliday, or rather two offers, either of which Keith might accept—as to the times of payment of the $60,000, the amount already agreed upon as the purchase money. Kellam testifies that to this he added, "I expect to have an interest in the land." He adds that he inserted that because Keith knew he wanted such interest, and because he had in a previous letter

expressed the wish that he should have it. Confidence in the absolute truth of this version of the letter is by no means impaired by the non-production of it by Keith.

The concluding part of this letter, as copied on page 24 of abstract—being the only part a copy of which was retained by Kellam—was, "If you accept either of the above offers, I will see to making out all necessary papers, &c. *Let us hear from you soon.*"

The latter sentence, the same as saying, "Let *me* hear from you soon," is strongly indicative of Kellam's personal interest in the matter at that late stage of the negotiations, and strongly corroborates the statement of Kellam that in a previous part of the letter he had frankly informed Keith, in response to the wish expressed in Keith's letter of the 7th, that he expected to have an interest. He does not say, "Holliday wants to hear from you soon." And that this concluding portion of the letter is exactly as stated by Kellam, is shown by "Exhibit I," attached by request of complainant to Kellam's deposition. There is the memorandum, in *Kellam's* handwriting, of this concluding portion, made on the back of the original offer of Holliday, as stated in the letter, in *Holliday's* own handwriting.

The proof, then, is fairly and reasonably clear that Kellam, at this stage of the negotiations, when there was ample time for Keith either to make inquiry as to value or to stop the trade, informed Keith with perfect frankness that he had availed himself of the suggestion of Keith in his letter of the 7th, had commenced negotiations with Holliday, and that these negotiations had progressed so far that he "expected to have an interest in the land."

The next letter of the series is one from Keith to

Kellam, of date July 29, (Exhibit "F" of Kellam's deposition.) It is as follows:

"JULY 29.

"DEAR ED.:—I will take twenty-five thousand down, and balance to suit you. Yours truly,

M. C. KEITH."

It was claimed in the oral argument that this could not be in answer to Kellam's letter of the *27th*, on the "geographical" assumption that the letter of the 27th could not have reached North Platte on the 29th. Let us see. The mail from Topeka to North Platte is sent by way of Atchison and Omaha. The time tables of the different railroads on the line are as follows. The date of July 27th, the date of the letter being added, as if it were the "starting day," and assuming that Kellam mailed his letter before or about 3 o'clock P. M.:

A. T. & S. F. leaves Topeka..... 4:10 P. M. June 27
And arrives at Atchison..... 6:00 P. M. June 27
Missouri Pacific leaves Atchison.....10:40 P. M. June 27
And arrives at Omaha..... 6:35 A. M. June 28
Union Pacific leaves Omaha.....12:20 A. M. June 28
And arrives at North Platte.....10:00 P. M. June 28

It will be thus seen that if the postoffice at North Platte were kept open till about 11 o'clock P. M., Keith could have received this letter in time to have dated his answer on the *28th!*

We assume that the Court will take judicial knowledge of the traveling facilities involved. If it does not, the oral argument on the other side falls of its own weight. But there is internal evidence in this letter that it is in answer to Kellam's of the 27th. Prior to this, Keith had referred to the proposed purchaser in different terms. In his letter of July 7, it was "that man;" in that of July 20, he says, "I will tell him," &c. In this letter the pronoun is changed, and the terms are to be to suit Kellam,

or taking it in the plural, Kellam and Holliday. It is not the language to be used by a principal to his agent. If the former desired to leave anything to the discretion of the latter, he would say, "Terms such as you think advisable," not "Terms to suit you." If Keith was using Kellam as his agent, Keith, and not Kellam, was the man to be "suited." If he had said, "What you deem best as to the balance will suit me," it would have been entirely different.

And it will be noticed that Kellam, in his subsequent letters, accepts the situation as perfectly understood by Keith, and writes in perfect consistency with the idea that he expected to get an interest, through Holliday, in whose name the title was to be taken, and that Keith knew it and approved it. In his letter of August 4, he says: "Send me abstract;" September 20, "We were anxious to get release from Boshman."

In further support of the assumption that Kellam's letter of July 27th reached North Platte in ample time for Keith to answer it on the 29th, is the fact that Keith's letters of July 7th and 29th were received by Kellam on the 9th of July and 31st, respectively.

And we now refer the Court to the testimony of Mr. Keith on this point, asking the Court to notice pages 170, 171, 172 of his deposition.

It will be first noticed by the Court that the letter of Kellam's of July 13th is the only one in which he asked "how the payments should be made?" The letter of July 27th did *not* ask; it simply contained, so far as it referred to payments, alternative offers of Holliday, to be accepted or rejected by Keith. Now, on page 170 of Keith's deposition, it will be seen that Keith was shown the letter of July 20th, and testifies that it is his hand-

writing. On the preceding page he had testified as to the letter of July 13th. He is then asked:

"Q. Was that the letter written by you in reply to Kellam's letter of July 13? A. I should think it was, sir."

Page 170, Record: Keith is shown his letter of July 29, and is asked:

"Q. Is that the letter written by you in response to the last letter referred to, received by Mr. Kellam? A. That's in answer to his letter written asking me how the payments should be made."

This answer is manifestly intended to be an evasive one, and it is equally manifest that Keith aimed to convey the idea that his letter of the 29th was in answer to that of Kellam's of June 13th—the latter being the only letter asking "how payments should be made." He seemed to have a memory too short to reach back to his answer to the fifth preceding question, in which he had admitted that his letter of the 20th was in answer to that of the 13th; and he thus puts himself in the position of answering the letter of the 13th twice within an interval of nine days, and without any letter from Kellam in the meantime—the letter of the 27th, the only one in the series that is lost, and the letter of the 13th, the only one that Keith has answered twice!! Common sense will allow no such absurdity, and we come to the conclusion that the letter of Kellam was received by Keith; that it was as testified to by Kellam, and that Keith's letter of the 29th was in answer to it, written with his eyes as fully open to results as they were when he evaded a direct answer to the last question copied above.

It is true that this "geographical" theory that the letter of the 27th could not reach North Platte in time to be answered on the 29th was not pressed in either of complainant's briefs and may not be pressed here. It

may be worldly-wise to assume that if a favorable general impression is made by the oral assertion, it would be the part of shrewdness not to risk its dissipation by again calling attention to the point.

Having brought the correspondence relating to the sale down to the date of July 29th — twenty-two days later than the time at which the price was definitely agreed to — the price being the only element in regard to which complaint is made, and fully two weeks after Kellam had proposed to Holliday to take an interest, with, as we insist, the knowledge and cordial approval of Keith — we see no necessity for going so minutely into the later letters. The correspondence will be found in the Record, pages 23 to 29, inclusive, and pages 146 to 150, inclusive, except Kellam's statement of the contents of the letter of July 27th, given above.

Some time about or prior to the fifteenth of July, Kellam, undoubtedly prompted, or at least encouraged, by Keith's letter of the 7th, proposed to Holliday to take an interest. (See Holliday's testimony, page 21 of Record; also, Kellam's first deposition, taken by complainant.) And, as would be natural, the only testimony on this point is that of the two defendants. It stands undisputed, and we submit that there is not a single circumstance disclosed in the entire testimony that weakens it, or in the least degree tends to cast suspicion upon it.

From this time till about the seventh or eighth of August — eight or nine days after Keith had been informed that Kellam "expected to have an interest," and had manifested his approval, fully a month after Keith had plainly suggested that he would like to have him interested — Holliday, influenced, as he testifies, by the idea that the burden was a heavy one for him to carry

alone, accepted the proposition of Kellam. Having seen all the correspondence, he had every reason to believe that this arrangement would be satisfactory to Keith, and, from the letter of July 7th, more than satisfactory. There is not one particle of evidence that there was any "conspiracy" between him and Kellam; that he had any reason to believe that Kellam occupied any such relations to Keith as those alleged in the bill, or that in "making Kellam his agent to purchase," as alleged in complainant's brief, he was not acting in the utmost good faith. And we therefore submit, while claiming that Kellam also acted in equally good faith, that as matter of law the sale cannot in justice to the defendant, Holliday, be set aside.

A employs B to purchase certain property for him of C. Unknown to A, B has, for some cause, an influence with C that enables him to purchase on easier terms. Can C for that reason have the sale set aside? Certainly, in such a case, the knowledge of the agent cannot be called the knowledge of the purchaser. More clearly still, where the agency only consists in offering a definite sum for acceptance or refusal; and yet more clearly where B, as in this case, acts only as a middleman to bring A and C together, and as a mouthpiece to them in communicating with each other, without in the least degree attempting to influence either as to the terms. And in this view of the case we submit that the fact that Holliday, still acting in the most perfect good faith, and after the price was agreed upon directly between him and Keith, agreed to let Kellam have an interest in the land, cuts no figure. The contract between Holliday and Keith is an entirety, and none the less so because there was an understanding between Holliday and Kel-

lam. That this understanding was "expected," was known to Keith, and he still continued to deal with Holliday alone.

We feel that we might claim our case on this ground alone, but when the decision involves the standing and character of men who for over thirty years have maintained an unblemished reputation in this community, and where the incidental question is involved whether they have perjured themselves in this suit, we ask to cover the whole ground, and meet every allegation of the complaint, and that the Court will give us the benefit of a careful analysis of the testimony.

The only evidence in regard to the relations of Keith and Kellam is to be found in the evidence of these two gentlemen. Where there is a conflict in their testimony, as on some quite material points there is, which one is to be relied upon? Some of these conflicts may be explained by the remoteness of the events and the natural failure of memory; some cannot. We think that it will take but a brief examination to decide whose testimony is the most reliable and whose memory is the best. Kellam was on the witness stand for the first time in his life. The closest examination of his evidence will fail to show any inconsistency in any material point, and no other witness except Keith has contradicted him to the slightest extent in regard to what passed between him and Keith.

How is it with Keith? Taking up his testimony in its order:

On page 152 of Record Keith testifies that the most friendly relations existed between him and Kellam.

Guy C. Barton, an old partner and intimate friend of Keith's, testifies, (p. 145 of Record) that Keith was opposed to the marriage of Mr. and Mrs. Kellam.

On page 153 of Record Keith says that Kellam acted as his agent "*in every way* connected with the land." And yet his letters clearly show that Keith controlled everything; decided for himself in everything to be done about the land; trusted to his own judgment, and absolutely left nothing to the judgment or discretion of Kellam!

In the same testimony he states that Kellam was in North Platte about 1884, for the last time. Afterwards he says it was from 1882 to 1884; thinks it was in 1882.

On page 158 he states that he had not seen him since, until in September, 1886.

Yet Guy C. Barton testifies (see p. 141 of Record) that Keith and Kellam met at his house in Omaha, November 22, 1885, at a marriage anniversary; that they dined together; that Keith then told witness that Kellam had offered him $40,000 for the land, and that Keith and Kellam conversed together. It would seem difficult for Keith to forget this meeting; and Keith (abstract, p. 167) don't remember this $40,000 offer.

On page 154 of Record Keith testifies that he had no knowledge of the building-up of the Potwin addition. Yet Kellam testifies that he sent him a printed plat of it; and Guy C. Barton testifies that he informed Keith of its being platted. (Page 140 of Barton's deposition.)

Keith says he relied upon Kellam for information as to value; yet he has testified, as stated above, that he never talked with him but *once about the value*, which must have been in 1879; and that he "did not write or cause to be written letters to Kellam seeking for information as to value." And Guy C. Barton (pp. 140 and 141 of Record) testifies that Keith sought information from *him* as to the value of the property. And yet Keith tes-

tified that he "never made any inquiry" of anyone but Kellam as to the value or about the land in any manner.

Perhaps the two contradictory statements of Keith that occur in the closest proximity may be found in three consecutive answers of his deposition. In answer 92, he was afraid Kellam "might not send the money; he had kept it so long." But in answers 93 and 94, he "was not afraid of not getting it."

The interval was a short one, but it was apparently long enough to enable him to see that his first answer was in direct conflict with his assertions of the entire faith he had in Kellam. It wouldn't do to assume that he trusted Kellam implicitly, but feared that he would steal!

His explanation of his letter to Kellam, "I would rather you would have it," as meaning, "I would rather you would be my agent to sell," (Record, p. 168,) is lame indeed. His letters show that he does not express himself in a way to be misunderstood.

As to Keith's denial that he received any proposition from Ross (Record, p. 169), that is clearly disproved by the original letter from Ross, transmitted to Kellam by Keith, and attached with Keith's letter as an exhibit to Kellam's deposition.

He says that he could not say whether, when he sent the deed, he knew who the purchaser was; and yet Holliday's name was in the deed as grantee.

On pages 174 and 175 of Record, Keith says he knew nothing of what was received from the railroad company as condemnation money except from Kellam's statement; yet in Burdge's testimony it is *admitted* that the receipt for $200 was *signed by Keith.* (Record, p. 261.) Yet Keith denies that he had signed any papers.

In view of these and other contradictions, inconsistencies and disproved statements of Keith, we respectfully submit that wherever there is a conflict in the testimony of the two, it is only fair and just that the evidence of Kellam should have the preponderating weight.

By way of placing the correspondence relative to the purchase, in its chronological order, and showing in what a fair and business-like way it was conducted, and how free from suspicious haste and urgency it was, as well as from any suggestions to influence or in any way mislead on the part of the defendants, we here reproduce it, arranged in that order, without comment:

First letter—Kellam to Keith:

"TOPEKA, KANS., June 30, 1886.

"DEAR MORRELL: A gentleman here wishes me to ask you if you will take a thousand dollars an acre for the south forty of your tract, or sixty thousand dollars for the whole. He wishes an early reply.

Truly yours, E. P. KELLAM."

Second letter—Keith's response:

"NORTH PLATTE, July 7, 1886.

"FRIEND KELLAM: I will take that man's offer, if he takes it within a few days. I would rather you would have it. Yours truly, M. C. KEITH."

Third letter—Kellam's response:

"TOPEKA, KANS., July 13, 1886.

"DEAR MORRELL: Yours to hand in due time, but I could not answer sooner. If you are still inclined to take this offer for the land, he would like to know how much you would require down, and the time and rate of interest on the deferred payments. I think there is no doubt but that he will take it, if terms are satisfactory.

"Weather hot and dry. Very truly yours,

E. P. KELLAM."

Fourth letter—Keith's response:

"NORTH PLATTE, NEB., July 20.

"FRIEND ED: I don't think I want to sell on time; but tell him to make me a proposition, and I will tell him what I will do."

(Not signed, but admitted by Keith to be in his own handwriting.)

Fifth letter—Kellam's response:

(This letter not produced by Keith, but contents testified to by Kellam. See Record, pp. 58, 62, 69.)

"TOPEKA, KAS., July 27, 1886.

"* * * Holliday will pay for the land as follows, viz.: In cash, $10,000; the remaining $50,000 to be paid in half-yearly payments, each $10,000, with interest at six per cent per annum; or would pay twenty thousand dollars cash down, twenty thousand dollars in one year, and twenty thousand dollars in two years, with interest at six per cent per annum, with the privilege of paying more or all of the purchase money at any time, and have corresponding portions of the land released—the back payments to be secured by mortgage on the land. * * * I expect to have an interest in the land. Shall require abstract of title, etc. If you accept either of the above offers, I will see to making out all necessary papers, etc. Let me hear from you. Yours truly,

"E. P. KELLAM."

Sixth letter—Keith's response:

"JULY 29.

"DEAR ED.:—I will take twenty-five thousand down, and balance to suit you. Yours truly, M. C. KEITH."

Seventh letter—Kellam's response:

"TOPEKA, Aug. 4, 1886.

"DEAR MORRELL:—I think sale will go through as per yours of the 29th, making first payment of twenty-five thousand dollars. You will hear from me again in a few days. Yours truly, E. P. KELLAM."

Eighth letter—Kellam's second response to letter of July 29:

"TOPEKA, Aug. 4.

"DEAR MORRELL:—I forgot to ask you, in my letter of to-day, to send *me* abstract of title to land, if you have

one, as it would save the cost of getting another. If there have been any matters of record since the date of same, they can be added to it. I am satisfied that the sale will go through. Yours truly, E. P. KELLAM."

Ninth letter—Kellam to Keith:

"AUG. 11, 1886.

"DEAR MORRELL:—Enclosed you will find deed made out ready for your signature. When signed and duly acknowledged, please return to me, to be delivered to the party upon the payment of twenty-five thousand dollars, and the notes for the balance and mortgage. The balance will consist of two notes of $17,500 each, making $35,000, and bearing interest at the rate of six per cent per annum, payable in one and two years, and secured by mortgage on the land. Before I deliver the deed, will send the notes and mortgage to you for your approval, and if all satisfactory, you return the mortgage to be recorded, and I will forward you a New York draft for twenty-five thousand dollars. Not having heard from you in regard to the abstract of title, will look it up at once. Very truly yours, E. P. KELLAM.

"P. S.—Please sign full name, as in deed, and fill date blanks. K."

Tenth letter—Keith's response:

"NORTH PLATTE, 18.

"DEAR ED.:—I was away when your letter came, but will send deed to-day, and have mortgage fixed and put on record. Yours truly, M. C. KEITH."

(*Mem.*: As shown by Kellam's testimony, this letter is of *August* 18 In complainant's abstract it is placed between the two letters of August 4.)

Eleventh letter—Kellam to Keith:

(Keith had mailed deed to Kellam without accompanying letter.)

"TOPEKA, Aug. 21.

"DEAR MORRELL:—Yours to hand, containing deed. Col. Holliday is in Boston; will return the first of the week, when I will make out mortgage, etc., and have it recorded, and forward to you. Yours truly,

"E. P. KELLAM."

Twelfth letter—Kellam to Keith:

"TOPEKA, KAS., August 30, 1886.

"DEAR MORRELL:—Enclosed find draft for twenty-five thousand dollars, F. Nat. Park Bank, N. Y., No. 46,248, as per my telegraph of this date. The balance of the papers will follow in a day or two.

Very truly yours, E. P. KELLAM."

Thirteenth (telegram)—Keith to Kellam:

"SEPT. 18.

"To E. P. KELLAM:—Is mortgage executed for record? Why don't you send? M. C. KEITH."

Fourteenth letter—Kellam's response:

"TOPEKA, KAS., Sept. 20, 1886.

"DEAR MORRELL:—Inclosed find notes and mortgages, due in one and two years from date. The reason I did not send them before was because *we* were anxious to get the release from Boshman before I put them on record. *We* have not got it yet, though I have written him twice, and sent him funds to pay the expense, &c., but have not received any word from him. But to accommodate you in your Omaha deal, will send to-day, although our attorneys say that the title is not clear without the release or a decree from the Court.

"Truly yours, E. P. KELLAM.

"Please to acknowledge. ED."

The general doctrine upon which the appellee relies is to be found *in extenso* in sections 956, 957 and 958 of Pomeroy's Equity Jurisprudence. We have no quarrel with that doctrine, neither have we any disposition to mitigate the exercise of extreme judicial scrutiny and extreme moral sensitiveness in carrying out this doctrine. We simply say that a brief examination of the cases in which the doctrine has grown up, and in which it has been cited and held, will show that the proposition of appellee in this case is not sustained by the analogy of the adjudicated cases.

In the case of *Roy v. Haviland*, 12 Ind., 364, the agent is expressly stated to have been entrusted with the duty of finding a purchaser. He was an agent to sell.

In the case of *Perry v. Taylor*, 49 Ill., 18, the agent, Vannell, was authorized to sell; and there was direct evidence of a fraudulent conspiracy between two agents of the complainant.

Michoud v. Girod, 4 How., 503, we have referred to above. It involved a flagrant and shameless violation of a fiduciary relationship of the highest character.

The case of *Davoue v. Fanning*, 2 Johns. Ch., 252, involved the same principle as the case in 4 How. last cited, namely: that if a trustee or person acting for others sells the trust estate, and becomes himself interested in the purchase, the *cestuy que* trusts are entitled as of course to have the purchase set aside and the property re-exposed to sale under the direction of the court, without reference to the public character of the sale or the fairness of the price paid.

An examination of the case of *Gardner v. Ogden, et al.*, 22 New York, 327, which was cited in support of the appellee's proposition in the court below, shows it to be equally inapplicable. In that case the real estate firm of Ogden, Jones & Company, being agents of the plaintiff for the sale of the land, sold the same to the defendant, Smith, and it appeared that the defendant, Hathaway, was also interested in the purchase. At the time of the sale, and for a long time prior thereto, both Hathaway and Smith were confidential clerks of the firm of Ogden, Jones & Company, and had access to the correspondence between their principals and the plaintiff. In fact, all the correspondence with the plaintiff re-

lating to the sale was carried on by Hathaway in the name of the firm. Under this state of facts there can be no question as to the justice of the decree ordering a reconveyance of the unsold portion of the property, but the difference between that and the case at bar is as wide as the hills.

The other authorities which were cited by the appellee to the court below were all of a similar nature to the foregoing, and were, of course, equally inapplicable to the case under consideration. Indeed, after an extended search we have been unable to find a decision which by any fair analogy supports the decree of the court below under the testimony and facts of this case as they appear in the Record.

As to agency to ascertain and pay taxes:

On this point we refer to the following:

In *Collar v. Ford*, 45 Iowa, 331, the syllabus reads:

"The fact that one was requested to ascertain and report to the owner, who lived in another State, the amount of taxes due on a piece of land, which he did, did not constitute him an agent with respect to the land, so as to charge him with fraud in buying the same for himself at less than its actual value."

An examination of the case will show that the syllabus is more than sustained by the opinion; and in the case thus decided the purchase was made *for less than one-fifth of the actual value.*"

Northrup v. Germania Fire Ins. Co., 48 Wis. 420: There the agent is stated to have been "the general agent of the plaintiff to collect rents and pay taxes on and to *find purchasers of*" plaintiff's land. Yet the court held that this was not such an agency as to preclude him from issuing a valid policy on the property, in behalf of an insurance company of which he was an

agent. The principle and reasoning underlying the decision seem perfectly applicable to the point under consideration. And as generally applicable to this and other features of the case, see *Walker v. Carrington*, 74 Ill. 446. We quote:

"Where a conveyance of land is sought to be set aside, as having been induced by fraudulent representations of an agent whose duties were advisory only, with no power to sell, the burden of proof lies upon the complainant to establish by clear and satisfactory proof that the agent acted in bad faith, and made material statements to the grantor to influence the sale, which he knew to be false, and that such statements influenced the sale."

And see paragraph 6 of the syllabus.

As having some bearing upon the case, see 61 Ill. 499; *Collins v. Sullivan*, 135 Mass. 461; *Fickett v. Durham*, 109 Mass. 419; *Kendall v. Mann*, 11 Allen, 1517.

We refer to these cases, rather because the principles involved and the reasoning of the court are applicable, than because the facts were strictly analogous to the case at bar; and we desire to leave it to the remembrance of the court, that we quote them as perhaps having more bearing on other points in the case than the one we are now considering. Among other propositions that we think can be traced out, and without any necessity for "reading between the lines," is that in such cases the complainant must establish, to a fair and reasonable certainty, that there has been a fraud that was the means of preventing the complainant from obtaining a higher price than that accepted, and at the time on which it was accepted; and in this case the acceptance was on the 7th of July, 1886, by the letter of Keith's of that date, received by Kellam, July 9th.

We have said above that the brief of complainant's

solicitors referred to one case on this point seemingly in their favor. This is the case of *Norris v. Taylor*, 49 Ill. 17. We have said in reference to this case, that it involved an agency to sell. We do not intend to be so uncandid as to pass over the case with that statement alone. We frankly admit that not only the syllabus, but some expressions in the opinion, are antagonistic to our proposition. But it will be seen that Norris, the purchaser, had employed Varnell, the agent of the complainant, to purchase the land (see p. 19); that Norris, the purchaser, made Varnell his agent to purchase, (see p. 21); that Varnell *was* an agent to sell the land (see p. 21), and so states to Norris, in the letter copied in the upper part of that page, saying: "He authorized me to sell at $1,500. If he knew I obtained $2,000 he might not feel kindly about it. *I ought to make something* out of it," &c. And yet, in the latter part of the same page, Judge Breese treats Varnell as not an agent to sell the land. In fact, it was plain that not only a close fiduciary relation was established in the case, but a conspiracy to defraud, compared with which stealing is respectable. The case is one of the many decided correctly, but on unsuitable reasoning. And this plausible explanation may be given, without discourtesy to the memory of an eminent judge: Judge Breese was approaching his eightieth year; he was Reporter of the Supreme Court in 1819; a U. S. Senator in 1842. The infirmities of age (with bated breath be it spoken) illy met the laborious duties of his position—and hence the mistake made in the statements preliminary to a proper conclusion.

With our theory of the case, we come to the conclusion that the value of the land at the time when Keith so deliberately accepted the price offered, cuts no figure.

Indeed, the question of value did not seem to influence the Court's decree. A review of this testimony, however, will satisfy the Court that by a fair preponderance of the evidence it is established that a full and fair price for the property as sold in an entirety was paid. It is worthy of notice, too, that all of the witnesses who placed the value of the property higher than that paid were real estate brokers whose interest naturally was to magnify values, as it tended to increase the percentage on sales—and in this respect the most honest witness is unknowingly biased. The extravagant estimates that were given by these witnesses, if they were to be confronted with them now under the conditions that have supervened since this case was presented, would be more than materially modified; and the *quasi* purchasers at these extravagant prices who affected to purchase suburban property at similar figures, and who failed to pay either principal or interest, but have abandoned their investments, would make a very sorry figure with offers of purchase at the present time. On the other hand, the witnesses who testified to the lower valuations were among the most prominent and respected business men of the city—men of cool and deliberate judgment, who had no possible motive or bias either toward magnifying or belittling values. Their number is fully equal to the other, their judgment more reliable, and the reasons given for their opinions far more sound and convincing. They show, too, that the rise in values took place after the purchase; a feature of the case strongly corroborated and made significant by the delay of Keith in bringing this suit.

We cannot believe that the Court will establish a doctrine which will unsettle every human transaction, pro-

vided the acumen of the purchaser should be justified by an increase in value of the thing purchased. There was no proof that tended to show a conspiracy upon the part of Holliday; the contrary is shown by positive and overwhelming proof. The Court does not find the existence of such a conspiracy. It is the gravamen of the whole bill; without it, the entire fabric falls. We submit, therefore, that the complainant has entirely failed to make out a case to set aside a contract so honorably, fairly and equitably made, and confidently look for a reversal of the decision of the lower court.

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Supreme Court of the United States.

OCTOBER TERM, 1891.

No. 269.

E. P. KELLAM AND C. K. HLOLIDAY,
APPELLANTS,

vs.

MORRELL C. KEITH.

BRIEF AND ARGUMENT OF APPELLEE.

A. B. QUINTON,
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Solicitors for Appellee.

A. BERGEN,
of Counsel.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

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vs.

MORRELL C. KEITH, APPELLEE.

Brief and Argument of Appellee.

BRIEF.

This is a suit wherein the complainant seeks to rescind a deed executed by the complainant on the 28th day of August, 1886, to the defendant C. K. Holliday for a certain tract of land lying in or near the city of Topeka, Shawnee county, Kansas, as is in said bill described, and to have defendants decreed to hold the title in trust for complainant. The necessary facts for a determination of this action are few; the most of them admitted, the rest established by the evidence.

It is admitted that complainant, Morrell C. Keith, is a resident of North Platte, Nebraska; that he was for some twenty years prior to the 28th day of August, 1886, the owner of the tract of land in said bill described; that the

said Keith had not been in the city of Topeka nor seen said land for twenty years prior to the 28th of August, 1886, nor then.

It is further admitted that the defendant E. P. Kellam was a nephew by marriage of the complainant; that the defendant E. P. Kellam's wife was a niece of Mrs. Keith, complainant's wife; that before her marriage to the defendant Kellam she was living and had lived for some long time with and in the family of the complainant, and while so living with the complainant the defendant Kellam made to her his addresses, married her at the complainant's home, visited the complainant frequently from time to time at his home since their marriage and for a period of nearly twenty years prior to 1886, making visits of several months at a time, meeting with them at the family reunions of the complainant from time to time; that the defendant Kellam is and has been a resident of Topeka for twenty years past; that about 1870 the defendant Kellam suggested that the land ought to be enclosed, and the complainant agreed with the defendant Kellam that if he (Kellam) would fence said land that he (complainant) would pay for said fencing; that if defendant Kellam would look after, take charge of, and care for said land for this complainant as his agent and pay the taxes or other assessments upon the same when due and payable, the complainant to furnish the money for the same, the defendant Kellam might have the use of the land; that the defendant did fence said land and the complainant paid for the same in or about 1870 (pages 151, 152, and 153 of Record); that the defendant Kellam notified the complainant each year from that time up and until 1886 of the amount of taxes on said land; that complainant each year correspondingly sent to the defendant Kellam the money to pay the same; that Kellam then paid the same; that Kellam, of his own volition, informed complainant that the land was assessed too high, and appeared before the county commissioners on two or three different occasions

for the purpose of having the assessed valuation of said land lowered, secured the same; then afterwards notified said complainant of what he had done; that defendant Kellam, without special request of plaintiff, did as plaintiff's agent on several occasions accept notice, and acted as plaintiff's agent in resisting the laying out of county roads through said land petitioned for by different persons; that defendant Kellam notified the complainant that a railroad company was asking the right of way through said land; that complainant intrusted said Kellam to resist the same unless they would locate a depot on the land; that no depot was ever placed upon said land; that defendant Kellam settled with said railroad company, signing the receipt for damages, "M. C. Keith, by E. P. Kellam, agent" (page 261, Record); that Kellam agreed upon the amount of damages for said right of way, receipted for the same by signing his name as agent; that he notified Keith of the settlement made and of the amount of money for damages received; that he (Kellam) would use the same for paying the taxes as far as it would go, and for complainant to send him the balance; that complainant sent balance and accepted the settlement, whatever and however it was made (page 148 to 151, Record); that Kellam did take charge of and care for said land as complainant's agent and "have an eye to it as a relative" (defendant Holliday's evidence, page 27, Record) for a period of nearly twenty years; that during all that time the defendant Kellam had the use of the same, receiving yearly rents and profits from the same, renting it out for pasturage and selling wood off from the same, some years having received two or three hundred dollars a year rent and by leasing it to a base-ball association. (Kellam's evidence, commencing on page 268, Record.)

It is further admited that the defendants Kellam and Holliday are both residents of Topeka, are and have been acquainted with each other for a long time; that Holliday knew of Kellam's connection with the land and complain-

ant; that Holliday personally knew Keith, knew where he lived, knew that Kellam was a relative of Keith, and that Kellam had charge of the property for Keith (page 17, Record); that defendants have been associated together in business for many years—Holliday president of the gas company and Kellam book-keeper—occupying the same office together, their rooms opening into each other's; were in 1886 and before that time and now, Kellam attending to some of Holliday's business in Holliday's absence, collecting rent and receiving and receipting money paid in on contracts from Holliday; that some time in the first part of June, 1886, Holliday sought to purchase the tract of land described in complainant's bill through Kellam, the defendant; made Kellam his agent for that purpose (Kellam's answer, page 288 to 296, Record); that he directed the defendant Kellam to write to complainant concerning the same; that he (Holliday) saw every letter, and dictated the same, written by Kellam to complainant; that he saw every letter received from complainant by Kellam; knew all that was going on; that he authorized the offer of $60,000; that Kellam made out the deed for complainant to sign and sent it to complainant; that complainant returned the same to Kellam; that it was understood and agreed between Kellam and Holliday, prior to the making out and signing of the deed by Kellam to complainant, that Kellam was to have a one-half interest in the said tract of land; that after said agreement the deed was made out in Holliday's name alone; that Kellam's name did not appear anywhere in the deed; that deed was sent to complainant, directing complainant to sign the same and return to defendant Kellam, to be delivered by Kellam to Holliday; that defendant Kellam made out the notes and mortgage for the deferred payments for the complainant Keith, fixing the times of payment and rate of interest; received them after execution by Holliday; received the cash payment from Holliday for Keith; that everything to be done by Keith was entrusted

to Kellam to be done by the complainant; that some thirty days prior to the delivery of the deed of Keith by Kellam to Holliday the deed was made from Holliday to Kellam for one-half interest in said land; that defendant Kellam never notified complainant of any one else, at that time, before, or at any time, wanting to buy the land; that Kellam (defendant) did not inform complainant of any greater offers having been made to him (Kellam) at any time for said land, or that any one else was seeking through him (Kellam) to get a price on said land.

The negotiations for the purchase of the property in controversy were conducted entirely by correspondence. The whole of the correspondence is as follows:

NORTH PLATTE, NEB., *May* 3, 1886.

DEAR KELLAM: I don't want a road there, but if it must be put in claim for damages get all you can. What can the land be sold for now?

Yours truly, M. C. KEITH.

Page 13 of Record.

TOPEKA, KANSAS, *June 30th*, 1886.

DEAR MORRELL: A gentleman here wishes me to ask you if you will take a one thousand dollars an acre for the south forty of your tract or sixty thousand dollars for the whole. He wishes an early reply.

Truly yours, E. P. KELLAM.

All well.

Page 146 of Record.

NORTH PLATTE, NEB., *July 7th*, 1886.

FRIEND KELLAM: I will take that man's offer if he takes it within a few days. I would rather you would have it.

Yours truly, M. C. KEITH.

Page 13 of Record.

TOPEKA, KANS., *July* 13, 1886.

DEAR MORRELL: Yours to hand in due time, but I could

not answer sooner. If you are still inclined to take his offer for the land he would like to know how much you require down and the time and rate of interest on the deferred payments. I think there is no doubt but that he will take it if terms are satisfactory.

Very truly yours, E. P. KELLAM.

Weather hot and dry.

Page 146 of Record.

NORTH PLATTE, NEB., *July* 20, 1886.

FRIEND ED.: I don't think I want to sell on time, but tell him to make me a proposition and I will tell him what I will do.

M. C. KEITH.

Page 14 of Record.

TOPEKA, KANS., *July* 27, 1886.

Holliday will pay cash down, $10,000; remaining $50,000 to be paid in half-yearly payments, each $10,000, with interest at the rate of 6 per cent. per annum; or will pay cash down, $20,000, remaining $40,000 as follows: In one year, $20,000; in two years, $20,000, with interest at 6 per cent. per annum; back payments to be secured by mortgage on the land. Wants privilege to pay more or all of the purchase-money at any time and have corresponding portions of the land released. Shall require abstract of title, &c. If you accept either of the above offers I will see to making out all necessary papers, &c. Let me hear from you soon.

Yours truly, E. P. KELLAM.

Page 15 of Record.

NORTH PLATTE, NEB., *July* 29, 1886.

DEAR ED.: I will take $25,000 down; balance to suit you.

Yours truly, M. C. KEITH.

Page 14, Record.

TOPEKA, KANS., *August 4th*, 1886.

DEAR MORRELL: I think sale will go through as per yours of the 29th ultimo, making first payment of twenty-

five thousand dollars. You will hear from me again in a few days.

Truly yours, E. P. KELLAM.

Page 147, Record.

TOPEKA, KANS., *August* 4, 1886.

DEAR MORRELL: I forgot to ask you in my letter to-day to send to me abstract of title to land, if you have one, as it would save costs of getting another. If there have been any matters of record since the date of same they can be added to it. I am satisfied that the sale will go through.

Truly yours, E. P. KELLAM.

TOPEKA, KANS., *August* 11, 1886.

DEAR MORRELL: Enclosed you will find deed made out ready for your signature. When signed and duly acknowledged *please* return it to me, to be delivered by me to the party upon the payment of twenty-five thousand dollars, and the notes for the balance and mortgage. The balance will consist of two notes of seventeen thousand five hundred dollars each, making $35,000 and bearing interest at the rate of 6 per cent. per annum, payable in one and two years and secured by mortgage on the land. Before I deliver the deed will send notes and mortgage to you for your approval, and if all satisfactory you return the mortgages to be recorded, and I will forward you a New York draft for the twenty-five thousand. Not having heard from you in regard to the abstract of title, will look it up at once.

Very truly yours, E. P. KELLAM.

P. S.—Please sign with full name, same as in deed, and fill date blanks.

Page 147, Record.

NORTH PLATTE, *August* 18, 1886.

DEAR ED.: I was away when your letter came, but will send deed to-day. You have mortgage fixt and put on record.

Yours truly, M. C. KEITH.

Page 14, Record.

TOPEKA, KANS., *August* 21, 1886.

DEAR MORRELL: Yours to hand containing deed. Col. Holliday is in Boston; will return first of the week, when I will make out mortgage, &c., and have it recorded and forward to you.

Truly yours, E. P. KELLAM.

Page 147, Record.

TOPEKA, KANS., *August* 30, 1886.

DEAR MORRELL: Enclosed find draft for twenty-five thousand dollars to National Park Bank, New York, No. 46248, as per my telegraph of this date. The balance of papers will follow in a day or two.

Very truly, E. P. KELLAM.

Please acknowledge.

Page 148, Record.

Telegram.

SEPT. 18, '86.

To E. P. Kellam:

Is mortgage executed for record? Why don't you send?

M. C. KEITH.

Page 15, Record.

TOPEKA, KANS., *September* 20, 1886.

DEAR MORRELL: Enclosed find notes and mortgages due in one and two years from date. The reason I did not send them before was because we were anxious to get the release from Boshmen before I put them on record. We have not yet got it, though I have written him twice and sent funds to pay the expenses, but have not received any word from him; but to accommodate you in your Omaha deal will send to-day, although our attorneys say the title is not clean without the release or a decree of court.

Truly yours, E. P. KELLAM.

ARGUMENT.

Counsel for appellants specify numerically seven errors in its decree rendered by the lower court. A careful reading of the errors assigned discloses the fact that they do not claim but two which they have arrayed in seven distinct habiliments of words per force of their glossary.

The first being, was there an agency—a trust imposed or fiduciary relationship existing between E. P. Kellam and M. C. Keith?

The second, did Kellam disclose what he knew concerning this property to M. C. Keith?

Before considering these propositions we want to call attention to some of the statements in brief for appellants which they have ingeniously enlarged upon until they reason themselves, no doubt, into the faith of their argument. On page four of brief they say defendant filed a verified answer. That is true, but complainant's bill waived answer under oath. But they disregard that entirely for argument. Then they proceed to take out statement here and there from the testimony of Mr. Keith and attempt to show inconsistencies, forcing construction from disconnected sentences not warranted, we submit by any rule of treatment to be administered. A sufficient refutation is to ask the court to read the testimony of Keith, 151 of Record, and of Kellam, 268 of Record.

Again, the effusiveness with which they dispose of other offers having been made to Kellam on page 22 of brief is ridiculous, to say the least, when $90,000 was offered for the land to Kellam in writing and $25,000 of that amount deposited in bank for that purpose (pages 188, 199, 220).

Again, they say, on page 23 of brief, that Kellam got an interest by the grace of Holliday and not by the grace of Keith. The better statement would be that if Kellam had only let a little of the gentle dews of heaven fall on Keith,

Holliday would have gotten no interest in the land by the grace of Kellam. On page 24 of brief appellants think court erred for the reason that, even if there was a fiduciary relationship between Kellam and Keith, Holliday owed no duty to Keith; he was not his brother's keeper. By the same authority Holliday should not have coveted his (Keith's) neighbor's servant, &c. They then proceed to set out the correspondence, and it is singular indeed that they have not been able anywhere to get that correspondence all together in the order in which it occurred and let it speak for itself. It is just like the record they have prepared, "disingenuously and inartistically" arranged, as a glance at the index will show that they have backed the case into this court; and particularly we call attention to the letter dated July 27, 1886, on page 50 of brief; then turn to the record, on page 15, for the same letter. *In the brief it states that Kellam expected to have an interest in the land.* The letter in record does not show any such statement. And now we come to the errors assigned:

I.

The first proposition that presents itself in the consideration of this case is: What was the relationship, or was there an agency, a trust imposed, or fiduciary relationship existing between the complainant, M. C. Keith, and the defendant E. P. Kellam? In elucidation of this proposition, it is admitted by the defendants that Kellam was agent to care for, take charge of, and pay the taxes on said land for nearly twenty years, but it is denied by the defendants that Kellam was the agent to sell the said land. In addition to the admission of the defendants Keith testifies that Kellam was the agent in the sale of this land, and that he (Keith) relied upon him in every particular to care for and guard his interests, and that upon such reliance he acted. The evidence shows that he did not have any other acquaintance

in Topeka, and that when in 1880 he had been written to by Ross & Co. for a price on said land he sent the letter to Kellam, referring the matter to him. (Page 13, Record.)

The evidence shows further that when written to by Bartholomew & Co., asking for the agency, he refused to give it for the reasons that he had one agent in Topeka, this defendant, E. P. Kellam. Again, the evidence shows that complainant had not seen said land, had not been in Topeka for nearly twenty years, nor did he know anything about the city's growth or improvements, and that he must rely upon some one for the value of this land. And to whom would he turn? The man who had charge of it for twenty years, most naturally; in fact the only man he knew of in Topeka, and he did, and upon May 30, 1886, asks Kellam, "What will the land sell for now?" Again, he never asks any one else, and Kellam don't claim that he ever did, and knew all the time all of the foregoing circumstances, and received his inquiry by letter May 30 and answered it, showing conclusively, we think, that complainant did rely upon defendant Kellam in regard to said land in every particular relative to his interest, and that Kellam knew of such reliance and sent back answer to the inquiry "that a gentleman here would give him $40,000 for south forty or $60,000 for the whole." (Pages 148 and 150, Record, tax receipts; page 261, receipt of treasurer; notice of publication, page 49.)

The principle of law is that where confidence is reposed on one side, a resulting superiority and influence on the other exists, a fiduciary relationship is established. The relation and duties involved need not be legal; it may be either moral, social, domestic, or personal, and the authorities are numerous that the care for and charge of property, the payment of taxes on the same, establishes such a relationship (2 Pomeroy Eq. Jur., secs. 936, 937, 938; *Roy* vs. *Haviland*, 12 Ind., 364; *Perry* vs. *Taylor*, 49 Ill., 18). Same rule is applicable to dealings between

agent and principal as between trustee and beneficiary. A purchase by trustee or agent, or other person occupying a fiduciary relation, without the knowledge of the principal that the agent or other person is the purchaser, is voidable at the election of the principal without regard to the fairness of the consideration.

2 Pomeroy Eq. Jur., secs. 936, 937, 938, 939.
1 Story Eq. Jur., sec. 323.
4 Howard (U. S.), 334, 56, 361 (*McLeod* vs. *Girod*).
Devoe vs. *Fanning*, 2 Johns. Ch., 259 (whole case).

Was Kellam the purchaser of the land in controversy?

This sale was negotiated entirely by correspondence, and to that correspondence we will have to look to ascertain when the contract of sale was consummated. When was the contract of sale subject to be enforced by an action for specific performance? On July 13, 1886, Kellam wrote to complainant (page 146 of Record) as follows: "If you are still inclined to take that man's offer he would like to know how much you would require down and the time and rate of interest on deferred payments. I think there is no doubt but what he will take it if terms are satisfactory." On page 14 of Record we have the answer to this letter, in which complainant says: "I don't think that I want to sell on time, but tell him to make me a proposition and I will tell him what I will do." This letter was written July 20, 1886. It is alleged that Kellam, upon the 27th of July, wrote an offer (page 15 of Record) to the complainant, in which he says that said Holliday would pay for the land as follows: "$10,000 cash," etc., * * * "or $20,000 cash," etc. * * * "If you accept either of the above offers I will see to making out all the necessary papers. (Signed) Kellam."

Complainant has not yet accepted any proposition and does not accept any claim to have been made; but upon the contrary, and upon July 29 (page 14 of Record) complain-

ant made a different proposition, demanding $25,000 cash, etc., and, in answer to this proposition of the 29th of July from complainant, Kellam answered upon August 4 as follows:

"I think sale will go through as per yours of the 29th, making first payment of $25,000." (Page 147 of Record.)

Upon August 11 Kellam again writes to complainant (page 147 of Record): "Enclosed you will find deed made out ready for your signature. When signed and duly acknowledged please return it to me to be delivered by me to the party upon the payment of $25,000. * * * Before I deliver the deed will send notes, deed, and mortgage to you for your approval." Complainant signs deed and returns the same to Kellam as directed. Upon August 21, 1886 (page 147 of Record), Kellam writes: "Deed received," and that Colonel Holliday is in Boston. Nowhere does it appear yet that Holliday has accepted the proposition of the complainant. Holliday testifies (page 22 of Record): "We (Kellam and Holliday) went out to see the land to see whether, in the first place, I (Holliday), and, in the second place, he (Kellam) would be justified in joining with me to take it at that price, * * * and this was between the 29th of July and the 7th of August;" that he then went to Boston to see if he could get the money (page 22 of Record), and here is where the letter of August 4, sent by Kellam to complainant, comes in, where he states, "I think the sale will go through;" that upon August 21 Holliday was in Boston, having gone to Boston on August 9 to get the money, if he could, to make the first payment (page 22). He returned from Boston on or about August 30, 1886 (page 22 of Record), and procured New York draft for $25,000, and gave it to Kellam August 31 (page 22 of Record, Holliday's own testimony). Up to this time there had been no definite acceptance by Holliday; no acceptance that complainant could have enforced against him in an action for specific performance, for

the proposition was $25,000 cash, etc., from complainant, and Holliday went to Boston to see if he could get the money. What if Holliday had not been able to have obtained the money in Boston? Would complainant have had any rights against him that could have been enforced on what has gone before? Not until Holliday procured the money in Boston and returned to Topeka and notified complainant, through Kellam, by delivery to Kellam of a New York draft, was complainant Keith's proposition accepted, and this was on the 30th or 31st day of August, 1886 (page 22 of Record). Holliday's testimony shows, and in this is corroborated by Kellam, that Kellam was a purchaser with him of a one-half interest between July 29th and August 7th, for he states (page 22 of Record): "We then, between the 29th of July and 7th of August, had concluded he (Kellam) should take it with me." Deed was made to Holliday alone and delivered by Kellam to Holliday, and Holliday accepted a deed to a one-half interest in said land in trust for Kellam.

The principle of law as laid down by Sir Edward Sugden and adopted by the United States Supreme Court in *McLoud et al.* vs. *Girod et al.*, 4 Howard, 554–'7, we think governs in this case.

"It may be laid down as a general proposition" "that trustees, agents, etc., or any person who, by their connection with any other person or by being employed or concerned in his affairs, have acquired a knowledge of his property are incapable of purchasing such property themselves except under the restraints which will shortly be mentioned, for if persons having a confidential character are admitted to avail themselves of any knowledge acquired in that capacity they might be induced to conceal that information and not to exercise it for the benefit of the person relying upon their integrity. *Emptor emit quam minimo protest venditor vendit quam maximo protest;*" and Mr. Justice Wayne says, in the same

opinion, when purchaser cannot purchase the estate for himself he cannot buy it for another, and cites authorities.

The restraints mentioned in the foregoing proposition of law are laid down to be, where principal knows the agent to be a purchaser, and the agent has disclosed everything within his knowledge concerning the property, making no concealment of anything touching or affecting the interests of the principal, that the principal may deal with all the knowledge that the agent may have, it being the duty of the agent to make this disclosure, and the right of the prinpal to believe that he possesses it from the agent without inquiry or search, and that a fair and just consideration has been paid.

We have been unable to discover any authorities holding contrary to the principles above mentioned and laid down by Mr. Justice Wayne in the case above referred to. We proceed further, upon the theory that is established by the evidence and admissions, that Holliday purchased this land through Kellam from the complainant for himself and Kellam, and that Kellam was in such a position that he could not become a purchaser; that Holliday could not purchase for Kellam; that Holliday knew of the relationship between Kellam and complainant; that Kellam was the agent and trustee for complainant in regard to this land; that Kellam was agent for Holliday and himself in the purchase of it.

The burden of proof is upon defendants to relieve themselves.

Mr. Bigelow on Frauds, in speaking of confidential relations, page 223, says: "If an agent seeks to uphold a transaction between himself and his principal, or a principal to avoid a transaction between himself and his agent, the burden is upon the agent to show that he gave to his principal the same advice in the matter as an independent, disinterested adviser would have done, and that he made a full disclosure of all he knew respecting the property, and that the

principal knew with whom he was dealing." (And numerous authorities there cited.)

We think that the evidence establishes the fact that complainant did not know even that C. K. Holliday was buying the land until about the 21st day of August, 1886, when he received deed for signature, and then only by seeing name of grantee in deed did he suppose that Holliday was the purchaser, and plaintiff did not know that Kellam was in any manner interested in the purchase until the 8th of September, when Kellam informed him that he had an interest. Complainant testifies to that fact (page 156 of Record), and the letters which contained all the information that complainant received on any matter in regard to this transaction substantiate it. In answer to letter of May 30, "What will land sell for now?" (page 15 of Record), Kellam answers, June 30: "A gentleman here wishes me to ask you if you will take $1,000 an acre for south forty, or $60,000 for the whole. He wishes an early reply" (page 147 of Record). There are two conclusions to be drawn by complainant from this letter, and reasonably, practicably, and naturally: First, that some one here had gone to Kellam for the purpose of purchasing this land; second, coming so soon after inquiry of "What will land sell for now?" and by Kellam's silence as to what it was worth on this occasion (always having informed him of whatever was for his interest), that that offer was a fair price for the land.

The first conclusion is the one we call attention to now, that complainant believed some one, and not Kellam, was wanting to purchase; and we want to say here Kellam never changed that impression given at that time, as it appears in the letters produced. In furtherance of that conclusion, July 9 (page 15 of Record), complainant writes: "I will take that man's offer. * * * I would rather you would have it," showing conclusively that complainant did not think of Kellam having anything to do with it. The last part of this letter we speak of further on.

On July 13 Kellam writes (page 147 of Record): "He would like to know how much you will require down. * * * I think there is no doubt but that he will take it if terms are satisfactory." In his alleged letter of the 27th of July Kellam says: "Holliday would pay for the land, etc. * * * If you accept either of the above offers I will see to making out all the necessary papers," etc.

Again, on August 4 (page 147 of Record), Kellam states, in direct connection with the impression given all along entertained by Keith, "I am satisfied sale will go through." On the same day (August 4) Kellam again states (page 147 of Record): "I think sale will go through as per yours of the 29th." * * * On August 11 Kellam writes again (page 147 of Record): "Enclosed you will find deed. * * * Please return to me to be delivered by me to the *party*, * * * before I deliver the deed," etc.

The deed is sent, made out to Holliday, the "party," "man," "gentleman," and the very one spoken of in the first letter, notes and mortgages made out and signed by Holliday alone in September, and Holliday's draft the first of September. Nowhere in all this correspondence does it appear that Kellam ever changed or sought to change the impression given in the first letter to complainant, and corroborated all the way along, until September 8, in Omaha, where complainant testifies he, for the first time, learned of Kellam's interest in the land. All the letters and facts, we say, corroborate Keith's testimony. The burden is on the defendants, and they do not set up anywhere in the pleadings that complainant knew of Kellam's interest. We call particular attention to this. The bill alleged complainant did not know of Kellam's having any interest in the land, and in a carefully prepared answer, in which they denied everything else with great particularity, they do not deny this, and then Kellam is put on the stand as a witness for a day or two; he then does not deny it, but after all the evidence has been taken by complainant and defendants he

goes on the stand the last time and says he notified complainant that he expected to have an interest in the land, and says "to have" and "have" are very different things.

We maintain—*first*, that Kellam never made that statement in writing to complainant; *second*, that if he did make such a statement upon July 27, and did not disclose then or afterwards all knowledge, information, and whatever he knew of improvements or facts affecting the value or the interest of complainant to said land, concealing nothing, the fact that complainant knew of his acquiring an interest does not affect the right of complainant to rescind.

Upon the first proposition that Kellam never wrote it we call attention to the fact that, in a carefully prepared and sworn to answer, he sets up what the contents of the letter were he wrote upon July 27 (page 15 of Record), and that he only retained the concluding part of said letter, which he sets up in that statement of the letter. Nowhere does it appear of any notification. When he was called upon the stand by plaintiff he did not know that he had notified or informed Keith he was to have an interest in the land. The question was then put as to when he first informed Keith that he had or was to have an interest, and then fixed the time as of September 8, in Omaha (page 281 of Record). But after all the depositions had been taken and complainant's own testimony was in, published and examined by defendants, Kellam then states positively that he informed complainant of his expecting to have an interest; and further states that he has the original memorandum containing on one side the proposition from Holliday, in Holliday's own handwriting, and what he wrote in the letter on the other side; and that it was written at that time; and here we compelled the claimed original to be attached to his evidence, and it does not show any information claimed for it. *Strange*, if he had given such information that he expected to have an interest, why did he guard so assiduously letting complain-

ant know of his interest afterwards? Why did he state, August 4, "I am satisfied sale will go through"? Why did he state, August 11, "Enclosed find deed. Please return it to me, to be delivered by me to the party"? Why did he have deed made out to Holliday alone upon August 21, when he had an interest since August 4 (page 22 of Record), and then refuse to deliver deed to Holliday until Holliday had delivered deed back to him (Kellam) for one-half interest? (Page 277 of record—Kellam's testimony.)

He never did inform the complainant that he expected to have an interest until September 8. Defendants' counsel seek, for a defense, to construe in this connection that part of Keith's letter dated July 7, page 15, where he says, "I would rather you would have it." Keith testifies that he used that expression because Kellam had wanted the land, and that he had promised him that if it was ever platted he might have the control of it, showing a friendliness and interest in Kellam on the part of the complainant, and that the complainant thought then that some one else was getting the land. In this connection they seek to force a construction favorable to the position they assume here, to the concluding of letter of July 24, where complainant says, "Balance to suit you;" but it will be remembered that no proposition had been agreed upon at this time, and complainant makes a different one from any yet submitted in the same letter, by requiring $25,000 cash instead of $10,000—what had been offered; and then he testified (page —, abstract of evidence) "that he believed Kellam was getting for the land all it could have been sold for, and that he was looking after and caring for my interest to that effect. I acted upon said belief and relied upon Kellam clear through this transaction; and when I said, 'Balance to suit you,' I meant by that that I thought we ought to have $25,000 cash, and that he might make the arrangements for the rest of the transaction, as he might deem best to consummate the sale for me. I did not know what other ar-

rangements he had made until I had received letter 5, in which he sent me deed, which arrangement I receipted as final, having been done by Kellam, my agent." The deed was made out to Holliday. The notes and mortgages were given by Holliday. Kellam attended to the whole affair; wrote to complainant to return papers to him for him to consummate and attend to the whole affair. We claim the evidence, outside of his testimony, would compel that conclusion as fair. Then he says that is what was meant; and when we consider that he would not be considered a man of culture from his position and ungrammatical language all through his testimony as the same appears, we think it would be wronging his intention to claim that he did not use the words "to suit you" colloquially, but that he used them for their technical and legal significance. No proposition had been made. Deferred payments and rate of interest had to be arranged for, and this is what is intended. Such arrangements in a deal of this importance must have been of some consideration to the purchaser, and oftentimes prevent a sale. They were in this case, as defendant afterwards went to Omaha to change them; saw complainant for that purpose, when an *exposé* was forced. Keith testifies that he did not need the money; never used the notes and mortgages as collateral nor in any way; never endorsed them; put them in safe and they have been there continuously.

He further testifies that he never attempted to keep any of Kellam's letters, but that they were thrown into the waste basket, and Mr. Neville (page 180 of Record) testifies that letters were thrown into the waste basket, and that those letters offered in evidence here were hunted up after Mr. Keith became dissatisfied with the sale. We invite a careful reading of the defendant Kellam's own testimony, the first time on the witness stand, on pages 268 to 282.

II.

Now to the second proposition. Did Kellam act in good faith with Keith? The law is: "There may be such relations between the parties that silence in the non-disclosure of a material fact will be a fraudulent concealment. If a person standing in a special relation of trust and confidence to another has information concerning property, and contracts with the other, and does not disclose his exclusive knowledge, the contract may be avoided, or he may be held as a constructive trustee. The same rule applies to all contracts of an agent or his principal trustee, with *cestui que trust.*, etc. If any of the parties above named propose to contract with the persons with whom they stand in such relations of trust and confidence, they must use the utmost good faith. *It is not enough that they do not affirmatively misrepresent; they must not conceal; they must speak fully to every material fact known to them or the contract will not be allowed to stand.* * * * He cannot himself contract at arm's-length and permit the other to act as though the relation was one of trust and confidence."

4 Howard (U. S.), 554–'7.

2 Johns. Chan., 239, *Devoe* vs. *Fanning.*

1 Perry on Trusts, § 178, cases there referred to.

2 Pomeroy Eq. Jur., §§ 957, 958.

Bigelow on Fraud, pp. 223, 224.

No claim is made by Kellam of imparting any information to complainant, except some years before to have sent to complainant a plat of Potwin place. All the information that can be gotten from a plat is that a large tract of land is laid off by mere lines into smaller tracts. Why did Kellam not tell complainant that the city had built up to the said land, and beyond it, with residences? that Potwin Place was an addition built up of a very fine class of residences—taken together, the finest in the city—and

that complainant's land was between that addition and the city; that Potwin Place adjoined it on the west; that a large city school-house had been built, and other residences, on the east and south, adjoining it (pages 184 to 202 and 220 to 250 of Record); that a street-car line had been in operation for several years within two blocks of the land, running past and considerably beyond it; that the Rock Island road had come to Topeka, and was making extensive improvements, and not "given Topeka a black eye," as he had formerly informed him, and the city was building that way instead of east; that the land was worth $100,000; that several parties had been to him, as Holliday came, to get a price on it; that he had refused Mr. Gillette, upon the 6th day of August, prior to sale to Holliday and himself, in the presence of Mr. Archer and Mr. McGraw, to submit $100,000, stating to them "they knew it was worth more money, but that if he would make it $125,000 he would submit it to Keith" (pages 220 to 226 of Record); and, further, that he had charge of that land and had been agent for years; and that Mr. Ferguson had been to see him several times to get a price on the land, coming in June; that he, Kellam, had asked Ferguson to make an offer, and that Ferguson asked him if $80,000 would buy it; that he told him no; that he knew it was worth more money; that J. N. Strickler had been to see him to get a price, and that he had promised Strickler to get a price, and never did, although Strickler asked him several times if he had been able to get a price on the land, and he said no, but he would get a price, these interviews extending from March, 1886, to August, 1886 (pages 233 to 242 of Record); that T. L. Stringham had been to see him to purchase the land in June, and that he (Kellam) informed him it was not for sale, but probably would be some time in the season, and that Stringham then informed him that he wanted a chance at it. (Pages 244 to 249.)

Why did he not inform him that J. B. Bartholomew sought from Kellam to get a price on it, and that he

(Kellam) told Bartholomew that it was not for sale, and that when it was for sale he (Kellam) would have the sale of it? This was in the early part of June, and Bartholomew had been to see Kellam several times (pages 189 to 199 of Record). Some of this information would have appeared well in an answer from Kellam to the inquiry of complainant, "What will the land sell for now?" Why did he not state that Geo. W. Watson, some five to ten days before the 20th of August, 1886, had made him an offer, in writing, of $90,000, one-third cash (pages 184 to 187 of Record, and corroborated by E. L. Blood and D. A. Moulton, page 187 of Record), $25,000 having been deposited by Blood with Moulton, cashier, for the sole purpose of purchasing this land?

Was complainant informed as to this land of all that Kellam knew? Why did not Kellam inform complainant of these other parties wanting to buy the land as well as Holliday? He knew that these, as well as Holliday, came to him to buy the land, believing he was the proper one. He made them believe so, kept them coming to him, told them he would get a price, yet never did it.

Kellam was agent of Holliday, to buy for Kellam and Holliday. A party cannot be the agent of two principals without the consent and knowledge of each. A contract thus made may be canceled (2 Pomeroy Eq. Jur., 939, and notes on pages 485 and 486 and authorities there cited). "If there be collusion between the agent and purchaser, the property can be recovered from the latter" (Bigelow on Fraud, page 229). "Slight evidence of collusion is sufficient" (Bigelow on Fraud, page 484). "The principal will be held implicated in the fraudulent conduct of his agent for that which he knows the agent has done if he insists on taking the benefit of the act." "It cannot matter that principal was innocent of fraud when contract obtained by his agent was effected. By accepting it he took it subject to all the rights of the other party, one of which was to rescind if

fraud had been perpetrated upon him. * * * Innocence, therefore, of a party that has profited by a fraud will not entitle him to retain the fruits of another's misconduct or exempt him from restitution." (Bigelow on Fraud, pages 366 and 367.)

Any surreptitious dealing between one principal to a contract and the agent of the other principal is fraud in equity and entitles the last-named principal to have the contract rescinded. (Bigelow on Fraud, page 403; 2 Pomeroy Eq. Jur., notes, pages 485, 486, and 487; *Panama Tel. Co.* vs. *India Rubber Co.*, Law R., 10 Ch., 15; 22 N. Y., 327.)

Upon this showing we think the decision in this case should be affirmed.

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APR 2 18
JAMES H. McKENNE
CL

Supreme Court of the United States.

OCTOBER TERM, 1891.

No. 269.

E. P. KELLAM AND C. K. HOLLIDAY,
APPELLANTS,

vs.

MORRELL C. KEITH, APPELLEE.

Supplement to Appellee's Brief.

Jurisdiction.

1st. Petition for removal filed by defendants and removal allowed; defendants allege citizenship and all grounds conferring jurisdiction. (Page 4 of Record.)

2d. Order of circuit court giving complainant leave to recast bill, and the bill recast and filed May 2, 1887; allege and show jurisdiction. (Page 8 of Record.)

3d. Also answers of defendants, afterwards filed on June 7, 1887. (Page 288 of Record.)

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